Supreme Court, U.S.
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No. 10-21 JUN 28 2010

OFFICE OF THE CLERK

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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May 27, 2010

QUESTION PRESENTED

Because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court, the petitioner humbly requests:

Will the United States Supreme Court *please* grant the *pro se* petitioner in this case an exercise of this Court's supervisory power?

PARTIES

The parties are, as represented by the caption to this case:

The petitioner is Kevin H. McKenna *pro se*.

The respondent is the Nestle Purina PetCare Co.

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OPINIONS BELOW

The United States District Court, Southern District of Ohio, Eastern Division did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 1-13.

The United States Court of Appeals for the Sixth Circuit issued a per curium order, did not publish an opinion in this case, and the Order is reformatted and printed in the Appendix at pp. 14-18.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued a *per curium* order on November 23, 2009. Petitioner's timely petition for rehearing and rehearing en-banc was DENIED on February 17, 2010.

On May 3, 2010 Justice Stevens GRANTED Petitioner's Application No. 09A1047, and extended the time to file this petition to and including July 17, 2010. This Court has jurisdiction under 28 U.S.C § 1254(1) to review the circuit Court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e– 2(a):

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or nation-al origin; or "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-cause of such individual's race, color, religion, sex, or national origin." .

42 U.S.C. §2000e– 3(a):

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment ... because he has opposed any practice made an unlawful employment practice by this sub-chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.".

STATEMENT OF CASE

I. Foreword:

The Respondent Nestle Purina PetCare (Nestle) has been maliciously misrepresenting Nancy J. Goss (Goss) as merely a "key witness" for purposes in this case, from within the underlying Title VII action. To be absolutely clear for this Court: Goss is the perpetrator of *perverse* workplace stalking, sexual and retaliatory harassment victimizing Kevin H. McKenna (McKenna) in and out of the workplace,

as cause of action in underlying litigation against Nestle.

Even prior to McKenna's termination of employment with Nestle in October 2004, McKenna has consistently asserted that Goss's behavior is "clinically delusional", "obsessive", and McKenna feared for his life by Goss. Since that time in 2004, McKenna has researched conditions similar to those, which McKenna has experienced in interacting with Goss. On November 04, 2006, McKenna served notice by means of email upon Nestle's legal counsel that it was in McKenna's "layman opinion [Goss] suffers from **Erotomania**". While the text of McKenna's' email to Nestle's legal counsel may not constitute expert testimony on the topic, within that same email, McKenna also appended a description of **Erotomania**, also known as "*de Clerambault Syndrome*", which McKenna believed reasonably depicts Goss's behavior. A true and accurate copy of the text of that email communication is included in this petition's **Appendix pp. 39 – 45**.

Since Goss's perverse behavior represents cause(s) of pending liability against Nestle, in both this and the underlying Title VII litigation, it provides an *extremely perverse* incentive for Nestle's legal counsel to misrepresent Goss's true character and actual role in these matters. The essence of this case, is the deliberate criminal actions taken by Nestle's legal counsel through it's access to pending Title VII litigation in the Federal Courts, as a means to incite and enable access by Goss (a stalker) as a vehicle or "cat's paw", to impose further harms upon McKenna outside the workplace, in an exceptionally perverse manner to "dissuade" McKenna from making or supporting a charge of discrimination.

II. Overview of the Case

A. Relevant Background of the Underlying Title VII Case, Which Gives Rise to This Case.

McKenna was employed with Nestle as a PC Technician from October 15, 2001 until McKenna's employment was terminated by Nestle on October 14, 2004. At the time McKenna's employment with Nestle was terminated, McKenna was forty-six (46) years of age, and happily married to his one and only wife of twenty-four (24) years.

From October of 2003 until late Spring of 2004, albeit McKenna was happily married, McKenna had unwittingly shared a consensual but *restricted*, sexually erotic natured *workplace* friendship (hereafter, "workplace friendship") with a co-worker, Nancy J. Goss (Goss). Consistent with the fact that McKenna was at that time, and still is happily married, it was a consensual stipulation between Goss and McKenna that McKenna would ***not*** consent to an *overtly sexual*, or any variation of a *romantic* interaction with Goss.

In the Spring of 2004, Goss developed a psychotic sexual obsession over McKenna. Goss began stalking and manifesting perverse hostility, or as Goss's self-described, "**FREAK reactions**" towards McKenna and *any* female Goss may have delusionally suspected McKenna *may* interact with at the workplace. At this point, Goss's perverse hostility substantially impaired McKenna's ability to perform his job duties, and McKenna's workplace friendship with Goss was no longer consensual.

In July of 2004, McKenna terminated the workplace friendship with Goss, mandating that

Goss's interactions with McKenna were now to be "100% professional". McKenna's termination of the workplace friendship infuriated Goss, escalating Goss's hostility, to stalking and harassment of McKenna. Now in fear Goss's hostility may likely escalate into potentially *fatal* violence by Goss, on July 28, 2005 at 2:20 PM McKenna informed local police of Goss's of the perverse hostility, "...in case they did find his body, possibly floating in the river, the police would know who to go after.".

On August 31, 2004, due to Goss's still unrelenting hostility through the month of August, McKenna now complained of Goss's harassment, providing information regarding Goss and McKenna's prior workplace friendship, McKenna's recent visit to the local police to Nestle's HR Manager. Shortly after, Nestle's HR Manager initiated an "informal internal investigation" into the matter. McKenna cooperated with Nestle's investigation up to and including when McKenna's employment was terminated on October 14, 2004.

On September 27, 2004, now fearing death due to overt hostility by Goss, McKenna urgently notified Nestle's HR Manager that, Goss's hostility was now intolerable and that the situation had escalated to a state of immanent crisis requiring immediate intervention by Nestle. Nestle placed Goss on administrative leave to facilitate Nestle's now, *formal* investigation into Goss's behavior.

On Friday, October 8, 2004, McKenna was also placed on administrative leave to facilitate Nestle's internal investigation into the matter. On Monday, October 11, 2004, Nestle initiated an investigation into alleged wrong doings by McKenna. On October 14, 2004 McKenna's employment and all employment

benefits were immediately terminated by Nestle, citing alleged violation of Nestle's email policy.

On October 15, 2004, Nestle gave notice to Goss that her employment was terminated for being an "over threat", for harassing and threatening her co-worker(s). However, Nestle extended Goss's pay and employment benefits for yet another additional week, until October 22, 2004.

On October 28, 2005, McKenna filed a complaint of sexual harassment and retaliation against Nestle in Federal District Court. On January 24 2006, formal court proceedings were initiated. The District Court held its initial pretrial conference at which time, Nestle's counsel served "Defendants Nestle Purina PetCare Co's Rule 26(a)(1) Pre-Discovery Disclosures", upon McKenna.

B. Prior Notice Previously Served Upon Nestle Regarding McKenna's Fear of Extreme Hostility by Goss.

• On October 18, 2004, in a protest to Nestle's termination of McKenna's employment, McKenna sent an email to Nestle stating, "*The primary reason this situation occurred that lead to my termination of employment is that I felt there was a very real possibility that* [Goss] *could or would impose physical harm upon herself and or workmates, either in or out of the workplace.*"; "*...the very real, perceived threat of, and my visions of* [Goss] *not only walking into the workplace, murdering me at my desk...*"; "*I went to* [Nestle's HR Manager] *because I felt the threat, or a potential of a threat was VERY REAL.*" (*underline emphasis added*).

• On November 21, 2005, Nestle admitted in Nestle's formal Answer to McKenna's Complaint, that Goss's employment with Nestle was: "*... terminated for being an "over threat", for harassing and threatening her co-worker(s)*".

Within one week immediately following pretrial conference on January 24 2006, marking proceedings, which *may* re-involve McKenna with Goss, McKenna served formal notice upon Nestle's *counsel* of Goss's overt hostility towards McKenna.

• On February 1, 2006 at 3:05 PM, McKenna sent direct notice to Nestle's attorneys by electronic mail, informing Nestle that: "*Nancy J. Goss is perceived to be an "Overt Threat" by myself and my family*"; "*(This document will be kept on record, so that in the case that a situation arises in the future, that you were expressly informed and REQUESTED to exercise due and reasonable care in regards to this matter)*".

• On February 1, 2006 at 10:12 PM, by means of electronic mail, McKenna again directly notified Nestle that: "*Suffice to say, words can not properly express how intensely serious I am that EXTREME CARE MUST BE TAKEN if some sort of action is going to even indirectly (re)involve Nancy with me.*"; McKenna was, "*STALKED in complete absence of rational thought and behavior*" by Goss.

• On February 22, 2006 at 1:36PM, by means of electronic mail, McKenna communicated to Nestle, his concerns of having his life (again) exposed to Goss' perception of her relationship with McKenna, stating: "*I will not knowingly, nor willingly allow or subject myself and/or any aspect of my life to (again) be exposed to her psychotic delusions*".

• On or about April 14, 2006, Nestle was formally served, by means of a Certified (signed, notarized, and sworn to be true) response to the Nestle's formal Rule 33 Discovery Request, McKenna stated: "*The Plaintiff deems Nancy J. Goss to be a STALKER, and therefore an overt threat to the Plaintiff's life and anything that may associate with the Plaintiff's life*".

• On June 12, 2006 at 12:39 PM, by means of electronic mail, Nestle was formally served public record of the Zanesville Police Department (ZPD) titled: "Supplementary Report", dated: "6/8/06", Inc.#: 0601125, Referencing McKenna's **July 28, 2004** visit to the ZPD, which states in part: *"He stated that while at work, he was being, in his opinion, sexually harassed by a female employee there"; "According to McKenna, he was in fear that the whole situation may become violent at some time."; "He stated that he would just like to have note of it in case they did find his body, possibly floating in the river, the police would know who to go after."*. **(Appendix pp. 53 – 55)**

• On June 16, 2006 at 10:13AM, by means of electronic mail, McKenna informed Nestle that by means of documents within Nestle's possession, that Goss has a documented "*history of Psychiatric/ Psychological issues of which have required her to be under the care of a Therapist*"; "*I have advised and warned you REPEATEDLY as to Nancy Goss's potentially hostile/violent irrationality, let this SERVE as my last best effort to have properly (warned) informed you.*"

• On November 4, 2006 at 8:43 AM, by means of electronic mail, McKenna informed Nestle's attorneys that it was McKenna's belief that Goss is an **Erotomaniac Stalker**: "*While I am not an "expert", I lived and am living the experince, I know what*

happened, and in my layman's opinion, Nancy suffers from Erotomania, and unfortunately for me, she had idolized me since before my employment with Purina (IE - Interview).". Significantly, McKenna had appended a description of the disorder to the end of the email. **(Appendix pp. 39 – 45)**

• On January 13, 2007 at 3:29 PM, by means of electronic mail: *"I *KNOW* she is dellusional, and to this day in my life, she is THEE single most hostile entity I have ever encountered, and I WILL NOT CONFRONT her until I have completely resolved to myself that I am literally willing to take her life, in defense of my life, and/or those around me.".*

C. **Stipulation By The Parties to a Prior Adulterated Workplace Friendship, Prior to Deposition of Goss.**

• On July 6, 2005, Nestle stated in its' Position Statement to EEOC that McKenna and Goss had maintained a prior consensual relationship. In September 2005, prior to the onset of litigation, McKenna obtained Nestle position statement to EEOC by the Freedom of Information Act.

• On October 28, 2005, in McKenna's formal Complaint of discrimination on file with the District Court: McKenna formally and expressly stated that McKenna had maintained a prior workplace friendship with Goss.

• On November 21, 2005 Nestle filed its formal answer to McKenna's complaint; 1) ¶2 **Nestle admitted** McKenna maintained a workplace friendship with Goss *as alleged in McKenna's complaint*; 2) ¶3 **Nestle admitted** McKenna informed Nestle of that same friendship.

• On April 14, 2006, by formal interrogatory response, McKenna further stipulated to Goss and McKenna's prior workplace friendship, where *McKenna* further articulated that *some* "sexual acts" occurred within the context of McKenna's past workplace friendship with Goss.

• On May 30, 2006, in response to McKenna's "Fourth Request for Production of Documents", Nestle produced the "Nancy Goss Investigation Statement" as referenced within "Defendants Nestle Purina PetCare Co's Rule 26(a)(1) Pre-Discovery Disclosures". Within that investigation statement now known to McKenna, Goss alleged specific sexual acts, conversations and emails transpired between McKenna and Goss during the workplace friendship.

It is inarguable that all of these aforementioned events, predate Goss's deposition testimony taken on "October 17, 18 and 19, 2006". It is logically impossible to assert that any such deposition testimony by Goss to that effect, on those dates, in any way "undermines Plaintiff's case and claims".

D. Overview of Case in Chief.

1) Nestle's Harassment of McKenna

On October 17, 18, and 19, 2006, Nestle and McKenna conducted deposition of Goss. By stipulation of Nestle, Goss and McKenna during the time of the deposition, Goss's deposition transcript was to remain **sealed "until trial"**. As a novice, *pro se* litigant, McKenna reasonably believed that "**sealed 'until trial'**" meant that Goss's deposition transcript was proof read by Goss, it would then be 100% inaccessible (IE – "**sealed**") to all parties, "until trial".

As such, McKenna could have no motive to give consideration to allegations made within Goss's "**sealed**" deposition transcript!

In November of 2006, Nestle made substitution of its lead counsel attorney to Brian E. Dickerson (Dickerson) and co-counsel Jonathan R. Secrest (Secrest). Within the first 45 days as counsel for Nestle, on January 14, 2007, as a clear testament to Nestle's internal complaint mechanisms, *and* seeking redress by litigation as being completely ineffective processes, Dickerson sent a sexually harassing email (harassing email) to McKenna, derived from Goss's **sealed** deposition testimony! Dickerson himself was now perversely acting as a conduit, as a perpetrator of Goss's harassment upon McKenna. Unbelievably Dickerson sent the harassing email directly to McKenna the actual victim of Goss's harassment, the aggrieved plaintiff in the underlying Title VII litigation (Appendix - p.48).

2) **McKenna's Opposition to Nestle's Harassment**

McKenna opposed Nestle's harassment with no less than FIVE (5) defensive emails, such as:

> "As far as some of her UNCONTESTED allegations (IE - not DEFENDED, by me at deposition.... which by the way are uncorroborated, because in fact they are impossible to, cause they didn't happen), is because I *KNOW* she is delusional, and to this day in my life, she is THEE single most hostile entity I have ever encountered, and I WILL NOT CONFRONT her until I have completely resolved to myself that I am

> literally willing to take her life, in **defense** of my life, and/or those around me."
>
> "Oh ya.... one last thing... this seeking relationship(s) with MEN.... go for it.... get any proof of that ANYWHERE other than the sex-crazed, dellusional allegation(s) of Nancy Goss. What an idiot. DON'T you THINK for one minute that I will allow these horrid allegations of hers go UNCHECKED in Court... trust me, you will witness her life getting CRUSHED like a light-bulb hitting the ground.... and THEN, since I will have attacked her dellusion(s), I must them prepare to **defend** the consequenses of that act.... and be prepared to **defend** my life, with my life, which I will do at that time."

On January 15, 2007, in reply to Dickerson's harassing email that was again immediately appended below McKenna's reply, now understandably exasperated by Nestle's ongoing harassment, McKenna sent a *distraught email* in direct reply to Dickerson's harassing email. Of critical importance: The *distraught email* that McKenna had sent Dickerson contained an *extremely harsh rejection* of Goss's (a stalker's) delusional perception(s) of Goss's past workplace friendship with McKenna.

On January 17, 2007, McKenna replied to Dickerson's harassing email, which was *again* immediately appended below McKenna's reply. However, this time McKenna stated further Title VII action may be initiated against Nestle for the sexual harassment *now* being perpetrated by Nestle's legal counsel! **(Please see Appendix pp. 46 – 48).**

2) Nestle's Retaliation Against McKenna:

Within *less than* forty-five **hours** of receiving McKenna's reference to further Title VII action, which may be initiated against Nestle for Dickerson's harassment of McKenna, *both* Dickerson and Secrest engaged in a coordinated conspiracy to now "explain" to McKenna why it is McKenna should not take *any* Title VII action against Nestle. Nestle's attorneys now set on course to mis-paint McKenna's week-old *distraught email* in **opposition** to Dickerson's harassment of McKenna acting as Goss's conduit, and paint that email as a "threat" against Goss.

To now create *false* motive for McKenna's *distraught email* to Dickerson, Dickerson drafted a *false* Court document (*fraudulent* document) [1], *falsely* asserting that the motive for McKenna's *distraught email* which McKenna sent to Dickerson, was now allegedly motivated by deposition testimony by Goss, which had been taken approximately three months prior, "**sealed 'until trial'**", which McKenna did ***not*** have access to at that time. Dickerson *falsely* asserts that Goss's testimony allegedly revealed an "almost year-long sexual relationship". As previously articulated herein, that fact was stipulated to by both parties, long prior to Goss's deposition in October 2006 [2]. Dickerson's *fraudulent* document also *falsely* asserts without any possible evidentiary support, that security personnel escorted McKenna out, when McKenna had previously visited Nestle's corporate offices:

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[1] Case: 2:05-cv-00976-ALM-TPK Doc #: 71 Filed: 01/19/07 Page: 1 of 2 PAGEID #: 857

[2] See pp. 9-10, at section: "**C. Stipulation By The Parties to a Prior Adulterated Workplace Friendship, Prior to Deposition of Goss.**"

> "On October 17, 18, and 19, 2006, Nestle and Plaintiff deposed Goss. Generally, Goss's testimony revealed her and Plaintiff conducted an almost year-long sexual relationship. Additionally, Goss testified as to specific sexual acts, sexually explicit conversations, and sexually explicit emails that transpired between her and Plaintiff. Goss's testimony undermines Plaintiff's case and claims."
>
> "Plaintiff previously visited Nestle's corporate offices in St. Louis, demanding to meet with certain corporate personnel, and was escorted out by security. Accordingly, Nestle feels it must formally inform the Court of these threats to Goss, and just inform Goss as well. To that end, Goss is being served with a copy of this Notice."

On January 19, 2007 at 1:12 PM, to eliminate the *true* motive for McKenna's *distraught email* to Dickerson, and to create a *false* exhibit (*fraudulent* exhibit) in support of Dickerson *fraudulent* document. Secrest forwarded McKenna's *distraught email* to himself, redacting McKenna's *distraught email* to Dickerson, by completely removing Dickerson's entire harassing email (Appendix p. 48), which had previously been appended immediately below McKenna's *distraught email*, from the content of the now *fraudulent* exhibit [3].

On January 19, 2007, Dickerson then formally filed Dickerson's *fraudulent* document supported by

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[3] Case: 2:05-cv-00976-ALM-TPK Doc #: 71-1 Filed: 01/19/07 Page: 2 of 2 PAGEID #: 856.

Secrest's *fraudulent* exhibit with the District Court (*fraudulent* filing). At 4:57 PM, Nestle made *electronic* service of the *fraudulent* filing upon McKenna, and under the alleged pretext that since now the *fraudulent* filing allegedly constituted an "overt threat" against Goss that the *fraudulent* filing would be formally served upon Goss! Significantly, Nestle requested the District Court to ascertain the severity of this threat [4].

On January 20, 2007, in the very early morning (**just past midnight**), within less than eight (8) hours of receiving electronic service Nestle's *fraudulent* filing, McKenna tried desperately to halt the perversely adverse actions of Nestle's attorneys against McKenna **(Please see Appendix pp. 49 – 52)**.

On the afternoon of Saturday January 20, 2007, McKenna received conventional *ground mail* service of Nestle's *fraudulent* filing. Goss and McKenna reside within the same postal zip-code. As such Goss would have received *actual service* of documents on that same day, which is also circumstantially supported by the Muskingum County Sheriff's Departments January 22. 2007 official report (report) on the matter. According to that same report, Goss had not received *actual service* of *fraudulent* exhibit at that time.

On Monday January 22, 2007, at approximately 12:00 PM the District Court granted McKenna's urgent request for a conference for the Court's intervention into the matter (conference). The conference was presided over the case's Magistrate Judge, Terrence P. Kemp (Judge Kemp),

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[4] Case: 2:05-cv-00976-ALM-TPK Doc #: 70 Filed: 01/19/07 Page: 2 of 3 PAGEID #: 853

with McKenna, his wife, daughter [5], and Secrest in representation of Nestle, in attendance. Judge Kemp initiated the conference with Nestle's *fraudulent* exhibit, which had been filed by Nestle with the District Court on Friday, January 19, 2007, already laying on the conference table immediately before him. In accordance with Nestle's request that the *District Court* ascertain the severity of the threat [6], **Judge Kemp stated directly to Secrest, that the District Court had ascertained that McKenna's *distraught email* did *not* constitute a threat against Goss.** As such, Judge Kemp then sought to halt *actual service* of the *fraudulent* exhibit upon Goss.

To circumvent Judge Kemp's attempt to intervene, Secrest himself then *falsely* represented to Judge Kemp that *actual service* of the *false* exhibit had in fact *already* been executed upon Goss (*fraudulent* representation). In reliance upon Secrest's *fraudulent* representation to Judge Kemp that *actual service* of the *fraudulent* exhibit upon Goss had in fact *already* been executed, Judge Kemp had then dismissed the conference upon the grounds that the Court could not halt an event, which Secrest *fraudulently* represented, had already occurred.

On Monday January 22, 2007, the Muskingum County Sheriff's Report (report) states that at approximately 6:00PM Secrest had made *actual*

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[5] McKenna's wife and daughter attended the conference as witnesses who had accompanied McKenna during McKenna's visit to Nestle's corporate headquarters', to offer testimony that McKenna did ***not*** "demand" to meet with anyone, ***nor*** was McKenna "escorted" out by anyone, ***nor*** was there any "security" personnel involved at any time, as falsely alleged in Nestle's fraudulent Court filing.

[6] As was expressly requested by Nestle at - **Case: 2:05-cv-00976-ALM-TPK Doc #: 70 Filed: 01/19/07 Page: 2 of 3 PAGEID #: 853**

service of the *fraudulent* exhibit upon Goss. Critically important is that Secrest made *actual service* of the *fraudulent* exhibit upon Goss, where less than just six hours prior, Secrest had witnessed that Judge Kemp had ascertained that McKenna's email was ***not*** a threat and would have issued a Court ORDER that Secrest ***not*** disclose the *fraudulent* exhibit upon Goss had Secrest not falsely represented that *actual service* of the *fraudulent* exhibit had *already* been executed upon Goss.

At approximately 6:26PM a Muskingum County Sheriff's deputy (deputy) was dispatched to Goss's residence, according to the report that based upon Goss's expressly stated reliance upon the context of the *fraudulent* filing *and* *fraudulent* exhibit which had been formally served upon Goss by Secrest and Dickerson acting as legal counsel for Nestle, Goss filed *false* charges of criminal menacing against McKenna.

On Monday January 22, 2007 at approximately 7:45PM, the deputy was dispatched to McKenna's residence. The deputy explained to McKenna that Goss had received the *fraudulent* exhibit, which had been disclosed by Secrest at approximately 6:00PM that same night. Outraged by Secrest's actions, McKenna informed the deputy that the matter had just been raised before Judge Kemp, no more than six (6) hours earlier that very same day with Secrest present! McKenna informed the deputy that Judge Kemp had already ascertained and informed Secrest that the *fraudulent* exhibit did ***not*** constitute a threat against Goss. McKenna also informed the deputy that Judge Kemp had in fact sought to prevent disclosure of the *fraudulent* exhibit by Nestle's attorneys earlier that same day.

Significantly, Dickerson and Secrest who assert to have been in some sort of allegedly orchestrated fear of an alleged "overt-threat" on Goss's life, premeditatedly chose ***not*** to make *direct* notice of this alleged threat *directly* to Goss. But rather Dickerson and Secrest made notice a full week later by taking the time to draft, file, and make *ground mail service* of two (2) formal Court documents, while Goss and McKenna's residences were separated by less than approximately twenty (20) minutes driving time. The Court documents speak on behalf of "Nestle" *not* "Dickerson" or "Secrest" actual people who can have "fear", *but* instead that it was "Nestle" a *business*, that is allegedly in "fear".

On Wednesday January 24, 2007, the Captain of Muskingum County Sheriff Department forwarded Goss's formal complaint of criminal menacing against McKenna to the Muskingum County Prosecuting Attorneys Office (PAO). The PAO dismissed the criminal charges against McKenna for the same reason found by the Judge Kemp prior to Secrest disclosing the *fraudulent* exhibit to Goss, finding that the email did ***not*** constitute a threat against Goss.

On Friday January 26, 2007, McKenna sought professional medicinal intervention to relieve emotional/psychic trauma as both a direct and indirect result of actions of attorneys Dickerson and Secrest by re-exposing McKenna to Goss. As a result of Dickerson's and Secrest's actions, McKenna remained medicated for several months, and thereafter suffered withdraw symptoms from the prescription medication.

III. PROCEEDINGS BELOW

On March 14, 2008, McKenna filed a complaint against Nestle in the Federal District Court of Southern Ohio - Eastern Division, under "42 U.S.C 2000e-5(f)(1) and 4112.02 of the Ohio Civil Rights Code". McKenna's complaint states:

> "I, Kevin H. McKenna am a:
>
> 1) Victim of discrimination as a Title VII complainant, by Nestle Purina PetCare Co. [...]
> 2) Victim of intentional actions taken by Nestle Purina PetCare Co., against me, which inflicted emotional distress/harm upon me".

McKenna's complaint also includes a lengthy sequence of detailed, factual statements, which support McKenna's allegations, each of which already have evidentiary support (Appendix pp. 20 - 45).

On April 10, 2008 Dickerson and Secrest filed a motion to dismiss McKenna's state and federal employment discrimination claims under Federal Rules of Civil Procedure – Rule 12(b)(6). Nestle's motion to dismiss alleges that 1) McKenna failed to allege a prima-facie case of retaliation, in that it was Goss, not Nestle who filed the actual complaint of criminal menacing against McKenna. 2) McKenna's *employment discrimination* complaint citing emotional/ psychic harm which McKenna **inarguably** *did* suffer as a *direct* result of Nestle's actions, were insufficient to support a claim that Nestle's conduct "was outrageous and extreme and beyond all possible bounds of decency and was such that it can be

considered as utterly intolerable in a civilized community" as is requisite under *Restatement of Torts* "Intentional Infliction of Emotional Distress".

On March 24, 2009 the District Court GRANTED Nestle's motion to dismiss McKenna's employment discrimination claim on the grounds that 1) "McKenna clearly has not alleged a *prima facie* case of retaliation, primarily because of his inability to establish the third prong"; "Reviewing both McKenna's Complaint and McKenna's Response in Opposition, however, reveals no allegation that Nestle ever filed criminal charges against McKenna"; "The assertion that Nestle could in any way be liable for the actions of Goss is unsupportable", and 2) "To state a claim for intentional infliction of emotional distress McKenna must allege that: Nestle's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community"; "Nothing done by Nestle was extreme or outrageous" (Appendix pp. 8 – 10).

On April 10, 2009 McKenna appealed the decision of the District Court. On November 23, 2009, the Sixth Circuit of Appeals, AFFIRMED by simply reiterating the District Court's dismissal, citing: "McKenna has not adequately alleged facts demonstrating that Nestle was involved in the filing of the criminal charges. Further, neither action was so extreme and outrageous as to give rise to a claim of intentional infliction of emotional distress" (Appendix p. 18).

REASONS FOR GRANTING THE PETITION

The *facts* as are asserted in this case are *not* mere "allegations". For each "allegation" as they have been asserted in the original Complaint and herein, *already* have *direct* evidentiary support. The only reason this case now comes before this Court, is because of the lower Courts' apparent *carte blanche* adoption or "rubber-stamping" of inapposite legal standards, which are established by the apparent "supreme" authority of Nestle's legal counsel.

Furthermore, the "rubber stamping" of inapposite legal standards by the lower Courts, is in direct contravention of several of this Court's *well-settled* precedents of the United States Supreme Court. Significantly, the lower Courts have not provided *any* compelling reason(s) whatsoever for the lower Courts departure from the doctrine of *stare decisis*.

As such, McKenna now humbly prays this Court engage in an exercise of this Court's supervisory power, as the facts and justice in this case demands, *and* to restore stability, predictability, and respect for exercise of judicial authority.

I. Disposal of This Case Requires Minimal Resources of this Court.

Simply stated, the actions of the lower Courts are so extraordinarily contrary to several of this Court's *well-settled* precedents, so clearly in error *and* to such an extent, it warrants this Court's intervention. It is for those same aforementioned facts that it also makes it completely appropriate for

this Court to *summarily* dispose of, or otherwise reverse and remand the case, without any requirement for briefing or argument by this Court.

"Considerations of stare decisis have special force in the area of *statutory interpretation*, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U. S. 164, 172-173 (1989) (*emphasis* added).

> "Time and time again, this Court has recognized that "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch*, supra, at 494; see also *Patterson v. McLean Credit Union*, 491 U. S. 164, 172 (1989); *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Adherence to precedent promotes stability, predictability, and respect for judicial authority. *Vasquez v. Hillery*, 474 U. S. 254, 265-266 (1986). For all of these reasons, we will not depart from the doctrine of *stare decisis* without some compelling justification. *Arizona v. Rumsey*, 467 U. S. 203, 212 (1984)."

Hilton v. South Carolina Public Railways Comm'n, 502 US 197, 202 (1991), *Cf.* also *St. Mary's Honor Center v. Hicks*, 509 US 502.

The lower Courts' complete disregard for *stare decisis* in this case, effectively refusing to tend to the business of this Court, has lead to the perverse results of a *pro se* employment civil rights litigant petitioning the highest Court in the land.

II. Title VII is of the Highest Priority.

McKenna, while acting in the cast role of a "private attorney general" on behalf of all Americans' rights, through his private action, was discriminated against by the acts of Nestle's legal counsel, in the most perverse way possible. More perversely, these actions can only have been taken against McKenna, but for the perpetrators' standing as attorneys, by access to privileged information while expressly cast in the role of agents for Nestle. Failure of this Court to intervene on this matter at this time would be tragic. These acts cannot be left unpunished.

This Court has on many occasions reiterated that a Title VII plaintiff is thee essential means to insure the Civil Rights Act of 1964 works, "Congress has cast the Title VII plaintiff in the role of 'a private attorney general,' vindicating a policy 'of the highest priority,'" *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980), *Fogerty v. Fantasy, Inc.*, 510 U.S. 523, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (both citing *Christiansburg Garment Co. v. EEOC*, 434 U. S. 417 (1978)). "[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII.... In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). See also *H.R. REP. NO.* 102-40, pt. 2, at 34 (1991) (report of the committee on the judiciary describing how the failure to adequately compensate plaintiffs has a chilling effect on the

'private attorneys general' policy of the civil rights laws).

The Second, Fifth, *Sixth* and Eleventh Circuits in favorable concurrence, have cited the Courts' role in the enforcement of Title VII:

> "Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate this form of discrimination. *It is, therefore, the duty of the courts to make sure that the Act works*, and the intent of Congress is not hampered by a combination of a strict construction of the statute in battle with semantics." (*emphasis* added)

Guardians Assoc. of New York Police Dept., Inc. v. Civil Service Commission, 633 F.2d 232, 254 (2d Cir.1980); *Tetro v. Popham*, 173 F.3d 988, 994 (6th Cir.1999); *Parr v. Woodmen of the World Life Ins.* Co., 791 F.2d at 892 (11th Cir.1986) (quoting *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir.1970)).

III. Held in Abeyance Pending Final Disposition of *Staub v. Proctor Hospital* (No. 09-400, Cert. Granted April 19, 2010)

Although circumstances in this case are in the employment retaliation context under Title VII, this Court's pending opinion in *Staub v. Proctor Hospital* (No. 09-400 – Cert. Granted April 19, 2010), is very likely to be relevant to this case. In the case that this Court would not immediately grant McKenna's Petition and *summarily* dispose of this case, given the similarity of "cat's paw" circumstances between

this case and *Staub*, it would seem appropriate that this case be held in abeyance until this Court disposes of *Staub*. Then without full plenary review, this Court could then rely on *Staub* as an additional basis to summarily dispose of, or reverse and remand McKenna's case to the lower Courts.

IV. Justice demands an exercise of this United States Supreme Court's supervisory power (S. Ct. R. 10(a)).

A. The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower Court.

1) Lower Court Disregard for *Conley v. Gibson*:

Simply stated, the lower Courts sanctioning of heightened pleading requirements as is expressly framed by Nestle, let alone upon a *pro se* employment civil rights litigant, is un-supported by established law.

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' *Conley v. Gibson*, 355 U. S. 41, 48. The Rules themselves provide that they are to be construed 'to secure the

> just, speedy, and inexpensive determination of every action.' Rule 1.".

Foman v. Davis, 371 US 178, 181-182 (1962), citing *Conley v. Gibson*, 355 US 41 (1957).

As this Court has pointed out, "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

2) Lower Court Disregard for *Haines v. Kerner*.

There is nothing McKenna can argue, which this Court has not already articulated itself:

> "The Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation's outset, without counsel. A document filed *pro se* is "to be liberally construed," *Estelle*, 429 U. S., at 106, and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," *ibid.*".

Erickson v. Pardus, 551 US (2007) (citing *Haines v. Kerner*, 404 US 519 (1972)).

> "[A]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the *pro se* complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U. S. 41, 45-46 (1957)."

Haines v. Kerner, 404 U.S. 520-521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

The lower Courts construed nothing in McKenna's favor, let alone liberally construed, and made no inferences favorable to McKenna, let alone liberally. The lower Courts disregarded all facts alleged in McKenna's complaint. Facts in support of the lower Courts' dismissal of McKenna's complaint are construed favorably from facts errantly accepted as true as alleged by the defendant.

3) **Lower Court Disregard for *BNSF v. White*:**

The lower Courts have unlawfully bifurcated harms alleged within McKenna's employment discrimination claims. The lower Courts are requiring that emotional/psychic harm suffered by McKenna as a direct result of retaliatory harassment which occurred within the context of state and federal employment civil rights proceedings, must meet the inapposite bar of relief under Restatement of Torts, Intentional Infliction of Emotional Distress.

This Court has held, "The employer's actions must be harmful to the point that they could well

dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. v. White* U.S., 126 S.Ct. 2405, 2409, 165 L.Ed.2d 345 (2006). The lower Courts' requirement that, "plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it", in the employment discrimination context simply stated is an outrageous and inapposite bar of relief.

4) Lower Court Disregard for *Harris v. Forklift Systems*.

This Court has already rejected a lower Sixth Circuit standard stating that harm suffered must "seriously affect [an employee's] psychological well-being" or leads the plaintiff to "suffe[r] injury." *Harris v. Forklift Systems, Inc.*, 510 US 17 at 20 (1993). This Court could not have made it any clearer, Title VII does *not* require concrete psychological harm:

> "We therefore believe the District Court *erred* in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury." Such an inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, *Meritor*, supra, at 67, there is no need for it also to be psychologically injurious."

Harris at 22. "This is not, and by its nature cannot be, a mathematically precise test... ... no single factor is required" *Harris* at 22-23.

Incredibly, in this action dismissing a *pro se* complaint under FRCP Rule 12(b)(6), a circumstance which mandates utmost liberal construction, the District Court and Sixth Circuit have *raised* the bar to relief that a *pro se* complaint must allege in an employment discrimination context, that "plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it".

5) **Lower Court Disregard for *Swierkiewicz v. Sorema*:**

This Court has consistently rejected heightened pleading standards not required by the Federal Rules themselves. For instance, in 2007, this Court rejected the Sixth Circuit's requirement that prisoners plead and demonstrate exhaustion in complaints under the Prison Litigation Reform Act. This Court reiterated:

> "In *Swierkiewicz v. Sorema N. A.*, 534 U. S. 506 (2002), we unanimously reversed the court of appeals for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination. We explained that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits," and a "requirement of greater specificity for particular claims" must be obtained by amending the Federal Rules. *Id.*, at 515 (citing

> *Leatherman*). And just last Term, in *Hill v. McDonough*, 547 U. S. ___ (2006), we unanimously rejected a proposal that §1983 suits challenging a method of execution must identify an acceptable alternative: "Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determineations of the federal courts." *Id.*, at ___ (slip op., at 8) (citing *Swierkiewicz*)."

Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007).

In a prior case before the District Court, where the plaintiff was *not* preceding *pro se*, actually represented by legal counsel, the District Court actually **volunteered** *Swierkiewicz*'s holding:

> "This Court's analysis of the proper pleading standard for Plaintiff's disability discrimination claim is guided by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), though neither party cites this case in their respective briefs. Therefore, an overview of *Swierkiewicz* is necessary. See *Jackson v. Crosset Co.*, No. 01-6262, 33 Fed.Appx. 761, 763, 2002 U.S.App. LEXIS 6039, at *3-4 (6th Cir. Mar. 29, 2002) (applying Swierkiewicz and stating "[t]o survive a motion to dismiss, a complaint need only contain a short and plain statement of the claim showing that the pleader is entitled to relief" (citing Swierkiewicz, 534 U.S. at 512, 122 S.Ct. 992))." (emphasis added)

Witte v. Rippe & Kingston Systems, Inc., 358 F.Supp.2d 663-665 (S.D. Ohio Feb 28, 2005).

> "The Court notes that although the *Swierkiewicz* Court focused its inquiry on whether an employment discrimination plaintiff is required to plead facts constituting a prima facie case of discrimination under the McDonnell Douglas framework, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), this Court finds that regardless of whether a plaintiff proffers direct or indirect evidence of disability discrimination, the FED.R.CIV.P. 8(a) pleading requirements apply to all employment discrimination cases. The direct evidence proof model, by logical extension, is an evidentiary standard, and therefore, is not a pleading requirement." (emphasis added)

Ibid at footnote #5.

However, in McKenna's case, the same District Court and same district judge, held McKenna's *pro se* complaint which "must be held to less stringent standards than formal pleadings drafted by lawyers" (*Erickson*), to an inapposite, higher *summary judgment* evidentiary pleading requirement, citing:

> "In order to establish a prima facie case of retaliation, McKenna must show that: (1) he engaged in a protected activity; (2) Nestle knew that he engaged in the protected activity; (3) as a result of McKenna exercising his protected rights, Nestle took an employment action adverse to him; and (4) a

> causal connection exists between the protected activity and the adverse employment action. See *Fenton v. HiSAN*, 174 F.3d 827, 831 (6th Cir. 1999).
>
> Construing McKenna's Complaint in the light most favorable to him, McKenna clearly has not alleged a prima facie case of retaliation..." (emphasis added)

(Appendix p. 6). The obsolete *Fenton* standard is a *summary judgment* standard, and is inapposite to any discrimination pleading requirement under FRCP Rule 8(a).

The Sixth Circuit has also acknowledged this Court's holding in *Swierkiewicz* on several occasions, for instance:

> "[Plaintiff] was not required to plead her prima facie case, *cf. Swierkiewicz v. Sorema* N.A., 534 U.S. 506, 511, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding in a Title VII case that "it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the McDonnell Douglas framework does not apply" when there is "direct evidence of discrimination")."

Back v. Hall, 537 F.3d 552, 558 (6th Cir. 2008).

> "The Supreme Court has previously warned lower courts against imposing heightened pleading requirements in the context of a claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. *Swierkiewicz v.*

> *Sorema N.A.*, 534 U.S. 506, 512-13, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).)"

Owens v. Keeling, 461 F.3d 768 (6th Cir. 2006) - at footnote #1.

McKenna specifically raised *Swierkiewicz* in his Appellant Brief to the Sixth Circuit, and again in McKenna's petition for rehearing. Undeterred, the Sixth Circuit completely disregarded McKenna's arguments citing *Swierkiewicz* and affirmed the District Court's order, *again* citing that McKenna must *establish* a prima facie case:

> "To establish a prima facie case of retaliation, a plaintiff must establish that 1) he engaged in protected activity, 2) the employer knew of the exercise of the protected right, 3) an adverse employment action was subsequently taken against the employee, and 4) there was a causal connection between the protected activity and the adverse employment action. *Hawkins v. Anheuser- Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008)" (Appendix p. 6)

Significantly, the Sixth Circuits' reliance on *Hawkins* is also a *summary judgment* evidentiary requirement, and is *again inapposite* to McKenna's *pro se* FED. R. CIV. P. 8(a) pleading requirements.

B. United States Court of Appeals of the Sixth Circuit has entered a decision in conflict with the decision the United States Court of Appeals of the Tenth Circuit on the same important matter *and* in a way that conflicts with a relevant decision of this Court.

Tenth Circuit of Appeals in affirming the findings of the District Court for the District of Colorado, found actionable retaliation where it was *only* "more probable than not", that the employer "caused", "used", "encouraged", etc. an adverse action.

Specifically the Tenth Circuit cited: "The court found it to be *more probable than not* that Stevinson and others in management at Toyota West ***caused*** Szekula *to initiate* the criminal complaint ... for the purpose of retaliating against Reynolds for his having filed a discrimination charge with the EEOC. The sequence and timing of these events, including Szekula's delay in going to the authorities, is sufficient probative circumstantial evidence that Toyota West and Stevinson ***used*** and ***encouraged*** Szekula *to initiate* this investigation and prosecution. *Berry*, 804 F.Supp. at 131." (***emphasis*** added) *Berry v. Stevinson Chevrolet*, 74 F. 3d 987 (CA10 1996).

This Court unambiguously stated, "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2412 (2006). In doing so this Court specifically cited the Tenth Circuit's finding in *Berry* as actionable retaliation:

"*Berry v. Stevinson Chevrolet*, 74 F. 3d 980, 984, 986 (CA10 1996) (finding actionable retaliation where *employer filed* false criminal charges against former employee who complained about discrimination)." *Id.*.

As the Solicitor General pointed out in the Brief for the United States as Amicus Curiae, in support of *Vincent E. Staub v. Proctor Hospital* (Petition No. 09-400 at p. 9 – Cert. Granted April 19, 2010), allegations in McKenna's claim already complies with the Sixth Circuit standards:

> "But as petitioner notes (Pet. 15-32), it is inconsistent with the decisions of ten other courts of appeals, which have imputed liability to an employer when a biased subordinate influenced, but did not herself take, the adverse employment action. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Rose v. New York City Bd . of Educ.*, 257 F.3d 156, 161-162 (2d Cir. 2001); *Abramson v. William Patterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000); ***Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 677 (6th Cir. 2008)**; *Stacks v. South- western Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-1323 (8th Cir. 1994); *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007); *BCI Coca-Cola*, 450 F.3d at 487; *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998)." (**emphasis** added)

McKenna's *pro se* complaint does sufficiently allege at statement 25 (Appendix p. 28) that Nestle's attorneys falsified a materially relevant document, and at statements 44 - 49 (Appendix pp. 33 – 34) Goss relied upon that false information. Direct evidence *already exists* which establishes that adverse actions taken by Goss against McKenna was in reliance upon *false* information provided by Nestle.

The Sixth Circuit's dismissal of McKenna's complaint is not only at odds with the Tenth Circuit in *Berry v. Stevinson*, which is favorably cited by this Court in *BNSF v. White* as actionable retaliation, making it at odds with this Court, but the decision is also at odds with the Sixth Circuits' own precedent: "By *relying* on this discriminatory information flow, the ultimate decisionmaker[s] 'acted as the conduit of [the agent's] prejudice—his cat's paw.' *Christian*, 252 F.3d at 877 (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990))."*. Madden v. Chattanooga City Wide Serv.* Dept., 549 F.3d 666, 678 (6th Cir. 2008).

V. McKenna *has* adequately alleged facts demonstrating that Nestle was involved in the filing of the criminal charges against McKenna.

Even against heightened pleading requirement abrogated by this Court in *Swierkiewicz*, upon *plain reading* of factual allegations of McKenna's *pro se* complaint, McKenna's complaint *does* sufficiently allege a causal connection. Statement 25(a) (Appendix p. 29) alleged that Nestle's attorneys falsified a material document. Statements 44 – 49 (Appendix pp. 32-33) allege that Nestle made service of that false document upon Goss, *and* that adverse action taken by Goss against McKenna *was in reliance upon that false document.* In fact, those "allegations" are supported by already existing *direct evidence.*

Sixth Circuit precedent provides a basis for McKenna's complaint, "By *relying* on this discriminatory information flow, the ultimate decisionmaker[s] 'acted as the conduit of [the supervisor's] prejudice—his cat's paw.' *Christian*, 252 F.3d at 877 (quoting *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.1990))." *Madden v. Chattanooga City Wide Serv.* Dept., 549 F.3d 666, 678 (6th Cir. 2008). Furthermore, *Berry v. Stevinson*, specifically cited by this Court in *BNSF v. White* further supports the causation standard in the retaliation context. Even further yet, the "cat's paw" theory of employer liability inferred by McKenna's complaint, is not only supported by the Sixth Circuit's holding in *Madden*, but is also a viable basis just as in *Staub v. Proctor Hospital* (09-400 Cert. Granted, April 19, 2010).

VI. McKenna *has* adequately alleged facts demonstrating that Nestle *sexually harassed* McKenna during the course of Title VII Litigation.

McKenna's complaint also sufficiently alleges McKenna was a victim of sexual and/or retaliatory harassment by Nestle, directly by and through Nestle's legal counsel at statements 20 – 21 (Appendix p. 27). Requisite *mens rea* is also alleged in McKenna's complaint at statement 25(a) (Appendix p. 28), where McKenna alleges that Nestle's legal counsel *premeditatedly* redacted the incriminating content of that sexual/ retaliatory harassment from the document [7], which Nestle filed with the District Court on January 19, 2007.

This Court has stated the general rule that "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396, 113 S.Ct. 1489, 1499, 123 L.Ed.2d 74 (1993). This Court explained that a client, having chosen a particular attorney to represent him in a proceeding, cannot "avoid the consequences of the acts or omissions of this freely selected agent," and that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Pioneer Inv. Servs.*, 507 U.S. at 397, 113 S.Ct. at 1499 (internal quotations and citations omitted).

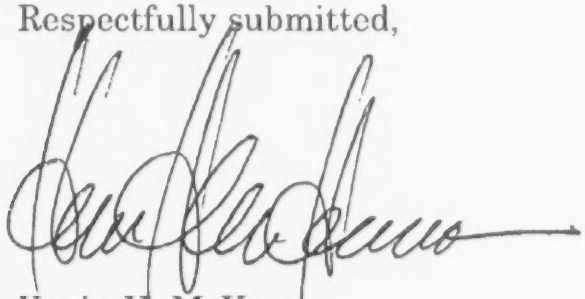
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[7] Case: 2:05-cv-00976-ALM-TPK Doc #: 71-1 Filed: 01/19/07 Page: 2 of 2 PAGEID #: 856

CONCLUSION

For the above reasons, as Justice demands, and for any other reason(s) this Court may deem appropriate when liberally construed most favorably to the Petitioner *pro se*, a writ of certiorari is appropriate to review the order of United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



Kevin H. McKenna
Petitioner – Pro Se
4885 Adamsville Road
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(740)452-3124

Supreme Court, U.S.
FILED

10-21 JUN 28 2010

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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May 27, 2010

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United States District Court,
Southern District of Ohio, Eastern Division.
UNPUBLISHED

KEVIN H. MCKENNA,

Plaintiff,

v.

NESTLE PURINA PETCARE CO.

Defendant.

Case No. 2:08 cv 253.

March 24, 2009.

OPINION AND ORDER

ALGENON L. MARBLEY, District Judge.

I. INTRODUCTION

This matter is before the Court on the Defendant Nestle Purina Petcare Co.'s ("Nestle") Motion to Dismiss and Request for Attorney Fees. For the reasons set forth below, this Court GRANTS Defendant's Motion to Dismiss, but DENIES Defendant's Request for Attorney Fees.

II. BACKGROUND

Plaintiff Kevin H. McKenna ("McKenna") was employed with Nestle between October 15, 2001 and October 14, 2004. He was terminated by Nestle for allegedly violating Nestle's Electronic Communications Policy ("ECP"). On October 28, 2005, he brought a lawsuit against Nestle titled, Kevin H.

McKenna v. Nestle Purina Petcare Co., Case No: C2-05-976 ("McKenna Lawsuit").

The events giving rise to this suit arise from the McKenna Lawsuit. On January 19, 2007, Nestle requested this Court take notice of a potential threat to Nancy Goss ("Goss"), a material witness to the McKenna Lawsuit. Goss is a former employee of Nestle who was terminated by Nestle on October 1, 2004 for harassing and threatening her co-workers. McKenna's complaint in the McKenna Lawsuit alleged, among other things, that he reported to Nestle that Goss had sexually harassed him. On October 17th, 18th, and 19th, 2006, Nestle and McKenna deposed Goss. Goss's testimony revealed that she and McKenna had conducted an almost year-long sexual relationship while employed with Nestle. Additionally, Goss testified as to specific sexual acts, sexually explicit conversations, and sexually explicit emails that transpired between her and McKenna. Nestle alleged that Goss's testimony undermined McKenna's claims.

On January 14, 2007, McKenna sent Nestle's counsel an email, which discussed Goss. In this email, McKenna wrote in reference to Goss, "Do I have to KILL this BITCH to get her the fuck off of me? WTF is it you people don't understand?!?!?!?!?!?!?!?!?!?!?!?!" (McKenna email to Brian Dickerson and Jonathan R. Secrest, Jan. 14, 2007) ("Email"). Nestle asserted it could not determine the severity of this threat and whether or not it was made in jest. McKenna previously had visited Nestle's corporate offices in St. Louis, demanding to meet with certain corporate personnel, and was escorted out by security.

Accordingly, Nestle asserts, it felt it had to formally inform the Court of the threat to Goss, and inform Goss as well. On January 19th, Nestle filed a Notice with the Court, which apprised the Court of the situation, and informed the Court that Goss was being served a copy of the Email. (McKenna Lawsuit, doc. no. 71).

On January 22, 2007, McKenna demanded to meet with any "Officer of this Court" to "issue a Civil Protective Order and halt Nestle's service" of the copy of the Email to Goss. (Complaint at p. 5). The Court held a status conference, in which the Court informed McKenna that it did not have the authority to issue a Civil Protective Order of the nature being requested by McKenna. Goss received the Email that same day. After receipt of the Email, Goss contacted the Muskingum County Sheriff's Department to file charges of criminal menacing against McKenna. The Sheriff's Department went to McKenna's residence and informed him it was acting upon a complaint of criminal menacing by Goss. McKenna informed the Sheriff's Department about the events that had occurred. McKenna was not arrested at that time.

On January 23, 2007, McKenna filed an Urgent Notice to Magistrate Judge Kemp to notify Judge Kemp of the events that had transpired. McKenna requested the Court "immediately demand all pertinent information to this matter in possession and control of the Muskingum County Sheriff's Department . . . and act as these egregious acts and justice demands." (McKenna Lawsuit, doc. no. 74). McKenna also requested the Court "order default judgment in this case, and initiate federal

prosecution of the Defendant/Defendant's Counsel in this matter." (Id.) Judge Kemp took no action in response to McKenna's Urgent Notice. On January 25th, the Muskingum County Prosecutors Office dismissed the criminal complaint filed by Goss. On January 26th, McKenna filed a Second Urgent Notice to Magistrate Judge Kemp to submit the Sheriff's Department's report on the matter. (McKenna Lawsuit, doc. no. 76). Judge Kemp took no action in response to this Second Urgent Notice.

McKenna asserts that on January 26, 2007, he sought "Professional, Medical relief of anxiety/emotional distress, inflicted upon McKenna, by actions initiated by Nestle and subsequent events, beginning at January 19, 2007." (Complaint at p. 8). McKenna asserts that his physician "concluded McKenna to be suffering from situational stress." (Id.) Thereby, he was prescribed an anti-depressant/anti-anxiety medication. (Id.) On February 12th and February 16th, McKenna's physician revised his prescription because the current prescription was not working. (Id. at 9). McKenna asserts that he took prescription anti-depressants/anxiety medication from January 2007 through April 2007. (Id.) Since April 2007, McKenna claims that he has suffered multiple symptoms of withdrawal from the anti-depressant/anxiety medication. (Id.)

III. STANDARD OF REVIEW

A case may be dismissed if the complaint does not state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). "A motion to dismiss for failure to

state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). Consequently, the Court must construe the complaint in the light most favorable to the non-moving party, accept all factual allegations as true, and make reasonable inferences in favor of the non-moving party. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 553 F.3d 430, 434 (6th Cir. 2008); *Murphy v. Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997). A court will grant a motion to dismiss under Rule 12(b)(6) only if there is an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. Cmty. *Mental Health Serv. v. Mental Health & Recovery Bd.*, 395 F. Supp. 2d 644, 649 (S.D. Ohio 2004).

Although liberal, this standard requires more than the bare assertion of legal conclusions. *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993). Under the federal pleading requirements, a plaintiff's complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the claim is, and the grounds upon which it rests." *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200 (2007) (internal quotations omitted)). While a complaint need not contain "detailed factual allegations," its "factual allegations

must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964 (2007).

IV. LAW AND ANALYSIS

A. Count One of McKenna's Complaint

In order to establish a prima facie case of retaliation, McKenna must show that: (1) he engaged in a protected activity; (2) Nestle knew that he engaged in the protected activity; (3) as a result of McKenna exercising his protected rights, Nestle took an employment action adverse to him; and (4) a causal connection exists between the protected activity and the adverse employment action. See *Fenton v. HiSAN*, 174 F.3d 827, 831 (6th Cir. 1999).

Construing McKenna's Complaint in the light most favorable to him, McKenna clearly has not alleged a prima facie case of retaliation, primarily because of his inability to establish the third prong. McKenna asserted in his Complaint that Nestle, "instigat[ed] the filing of false criminal charges against me, for my filing charges [of] unlawful discrimination (opposition) against Nestle . . ." (Complaint at p. 1). In McKenna's Response in Opposition, he again states that the adverse action he suffered was a "Criminal Complaint filed against McKenna." (Response in Opposition at p. 11). Reviewing both McKenna's Complaint and McKenna's Response in Opposition, however, reveals no allegation that Nestle ever filed criminal charges against McKenna.

Rather, McKenna states, "Nancy J. Goss contacted the Muskingum County Sheriff's Department to file a criminal complaint against McKenna." (Complaint at p. 7). There is no allegation that Nestle contacted the Sheriff's Department, that Nestle told Goss to contact the Sheriff's Department, that Nestle knew Goss was contacting the Sheriff's Department, or that Nestle had any control over Goss's actions. Goss is a former employee of Nestle who was fired by Nestle. Any actions Goss took were of Goss's own accord. The assertion that Nestle could in any way be liable for the actions of Goss is unsupportable.

Furthermore, Count One is based on the filing of "false criminal charges." (Id. at p. 1). There is no allegation in McKenna's Complaint that any false criminal charges were filed. McKenna asserts that the Muskingum County Prosecutor's Office determined that McKenna's actions "did not constitute an `overt threat' by McKenna against Nancy J. Goss." (Id. at p. 8). The Complaint does not state, however, that the criminal charges were "false." Though ultimately non-meritorious, the charges were based on a "true" email sent by McKenna to Nestle's counsel containing threatening language concerning Goss.

McKenna has failed to allege facts to support that Nestle "instigat[ed] the filing of false criminal charges" against McKenna. The third prong of the prima facie case for retaliation has therefore not been established. Nestle's Motion to Dismiss Count One is GRANTED.

B. Count Two of McKenna's Complaint

To state a claim for intentional infliction of emotional distress, McKenna must allege that: (1) Nestle intended to cause emotional distress or knew or should have known that its conduct would result in serious emotional distress to McKenna; (2) Nestle's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; (3) Nestle's conduct was the proximate cause of McKenna's psychic injury; and (4) McKenna's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it. See *Quintile v. Medina County*, No. 1:07CV2413, 2008 WL 2484173, at *8 (N.D. Ohio June 17, 2008) (citing *Ekunsumi v. Cincinnati Restoration, Inc.*, 698 N.E.2d 503, 506 (Ohio App. 1 Dist. 1997)). With regard to the "outrageous and extreme conduct" element, the Ohio Supreme Court explained:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by `malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

> Generally the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, `Outrageous.'

Yeager v. Local Union 20, 453 N.E.2d 666, 671 (Ohio 1983) (overruled on other grounds) (internal quotation marks and citation omitted), cited in Martin v. JBS Techs., LLC, 443 F.Supp.2d 962, 969-70 (S.D. Ohio 2006).

McKenna asserts as the basis for his intentional infliction of emotional distress claim that Nestle informed Goss about McKenna's Email, even though Nestle was "expressly and repeatedly warned [about the harm that] could or would come to McKenna by Ms. Goss" and Nestle "caus[ed] Ms. Goss (third-party) to initiate a criminal complaint against McKenna." (Response in Opposition at p. 13). Once again, Nestle did not file any criminal charges against McKenna, Goss did. The only thing Nestle did was send Goss the Email that McKenna had sent to Nestle's counsel. If McKenna did not want this Email shared, perhaps he should not have sent it to the opposing party's counsel in the first place. Nestle had every right to communicate with one of its key witnesses about a potential threat to that witness, and there was nothing privileged or protected about that Email. It was not up to Nestle to assess this threat; that was Goss's decision. Goss knows McKenna better than Nestle and was in a better position to determine whether McKenna was actually threatening her or blowing off steam. On her own, Goss determined McKenna's threat was legitimate

and contacted the Sheriff's Department. Nothing done by Nestle was extreme or outrageous. Nestle simply provided a copy of the Email, concerning Goss, to Goss. Nestle's Motion to Dismiss Count Two is therefore GRANTED.

C. Request for Attorney Fees

Nestle also requests attorney fees incurred in defending this action. Pursuant to 28 U.S.C.S. § 1927:

Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred as a result of such conduct.

Nestle asserts that no reasonable person could find that McKenna's Complaint contains any merit. Nestle claims that the proceedings in this case were unreasonable and vexatious, and their purpose was solely to harass Nestle.

The Sixth Circuit authorized an award of attorney fees against a Title VII plaintiff in Riddle v. Egensperger, 266 F.3d 542 (6th Cir. 2001). The Riddle Court determined such an award was proper when a plaintiff's action is "frivolous, unreasonable, or without foundation." Id. at 557. The Riddle Court cautioned, however, that awarding attorney's fees to a defendant is only appropriate in "the most extreme and egregious cases of misconduct." Id. In this case, though this Court has found the claims to be

ultimately non-meritorious, this is not the rare circumstance justifying awarding Nestle attorney's fees. Nestle's Request for Attorney Fees is therefore DENIED.

Nevertheless, this Court cautions that pleadings McKenna has filed in this action move dangerously close to sanctionable behavior. Being a pro se litigant is not a license for McKenna to state and do whatever he wants. There is not a different standard for Rule 11 sanctions for attorneys and non-attorneys. Spurlock v. Demby, No. 92-3842, 1995 WL 89003, at *2 (6th Cir. Mar. 2, 1995). Rather, Rule 11 "speaks of attorneys and parties in a single breath and applies to them a single standard." Id. (quoting Bus. Guides, Inc. v. Chromatic Communications Enters., Inc., 498 U.S. 533, 548 (1991). Pro se filings do not serve as an "impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." Grider v. Irvin, No. 1:06CV-53-TBR, 2007 WL 4441214, at *4 (W.D. Ky. Dec. 17, 2007) (granting Rule 11 sanction of attorney's fees against pro se plaintiffs for filing an unreasonable motion to amend judgment); see also Cooksey v. McElroy, No. 1:07cv581, 2008 WL 4367593, *25 (S.D. Ohio Sept. 24, 2008) (finding that it is appropriate to impose sanctions against a pro se plaintiff for his violation of Rule 11); Kish v. U.S., No. 1:95:MC-109, 1996 WL 196730, *5 (W.D. Mich. Jan. 30, 1996) (granting monetary Rule 11 sanction against pro se plaintiffs).

In the McKenna Lawsuit, Judge Kemp has already specifically warned McKenna about his comments

filed in pleadings. In denying Nestle's Motion for Sanctions, Judge Kemp stated:

> The Court will not award sanctions at this time. However, Mr. McKenna is advised, in the future, to be more temperate in his comments toward the conduct of opposing counsel. If he does choose to make statements impugning the honesty or integrity of such counsel and is not able to support such statements with a factual showing, sanctions may well be imposed in the future.

(McKenna Lawsuit, doc. no. 97 at pp. 5-6). In this case, in McKenna's Response in Opposition, McKenna accuses Nestle's counsel of, among other things, engaging in an "insanely `aggressive' campaign to `win' Case C2-05-976 by absolutely any and all means at their disposal" (Response in Opposition at p. 2); "set[ting] out on an aggressive course to obstruct any and all further discovery requests made upon Nestle" (Id. at p. 3); and "effectively attempt[ing] to `assassinate' any aspect of my life within their means and reach" (Id. at p. 4). These comments are inappropriate and unsupported. This serves as McKenna's final warning to temper his comments toward the conduct of opposing counsel. If McKenna continues to impugn the honesty or integrity of opposing counsel without factual support, sanctions will be imposed.

V. CONCLUSION

For the foregoing reasons, this Court GRANTS Defendant's Motion to Dismiss, but DENIES Defendant's Motion for Attorney Fees.

IT IS SO ORDERED.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 09-3400

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN H. MCKENNA,

Plaintiff-Appellant,

v.

NESTLE PURINA PETCARE COMPANY,

Defendant-Appellee.

On Appeal From The United States District Court
for the Southern District of Ohio

ORDER

Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

Kevin H. McKenna, an Ohio resident proceeding pro se, appeals a district court's order and judgment granting defendant's motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

In 2008, McKenna filed a complaint against Nestle Purina Petcare Company ("Nestle") alleging retaliation under 42 U.S.C. § 2000e-5(f)(1), and intentional infliction of emotional distress under Ohio Rev. Code § 4112.02. Nestle filed a motion to

dismiss, arguing that McKenna failed to state a claim upon which relief may be granted. The district court granted the motion to dismiss and entered judgment in favor of Nestle.

On appeal, McKenna argues that the district court erred in dismissing his complaint because he alleged sufficient facts to state a claim for retaliation and intentional infliction of emotional distress.

We review de novo a district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6). *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). In considering whether dismissal for failure to state a claim is appro-priate, the court must accept as true all factual allegations in the complaint and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009). To avoid dismissal, "a com-plaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Generally, pro se pleadings "are liberally construed when determining whether they fail to state a claim on which relief can be granted." *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004).

In his complaint, McKenna alleges that he was employed by Nestle from October 2001 to October 2004. In October 2005, McKenna filed a Title VII complaint against the company asserting that he had been harassed by Nancy Goss, a fellow employee. McKenna alleges that Ms. Goss had her employment with Nestle terminated in fall 2004.

While conducting discovery in the Title VII action, McKenna and Nestle exchanged numerous emails, include-ing an "emotionally distressed" email

("the email") sent from McKenna to Nestle concerning Ms. Goss. Construing the email as constituting a possible threat against Ms. Goss, Nestle subsequently initiated service of the email to Ms. Goss. McKenna unsuccessfully sought a court order to halt service of the email to Ms. Goss.

McKenna alleges that, after receiving a copy of the email from Nestle, Ms. Goss filed formal charges of criminal menacing against him with the Muskingum County Sher-iff's Department. The Sheriff's Department subsequently visited McKenna, but he was not arrested or prosecuted.

McKenna alleges that, as a result of Nestle's actions, he was forced to seek medical treatment, that he took anti-anxiety medication for several months, and that he suffered multiple symptoms of withdrawal after he stopped taking the medication. To establish a prima facie case of retaliation, a plaintiff must establish that 1) he engaged in protected activity, 2) the employer knew of the exercise of the protected right, 3) an adverse employment action was subsequently taken against the employee, and 4) there was a causal connection between the protected activity and the adverse employment action. *Hawkins v. Anheuser- Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008); see also *Greer-Burger v. Temesi*, 879 N.E.2d 174, 180 (Ohio 2007). The "adverse employment action" requirement in the retaliation context is not limited to an employer's actions that solely affect the terms, conditions, or status of employment or only those acts that occur at the workplace. The retaliation provision instead protects employees from conduct that would have "dissuaded a reasonable worker from making or

supporting a charge of discrimination." *Hawkins*, 517 F.3d at 345.

McKenna alleges that Nestle retaliated against him by "instigating the filing of false criminal charges." McKenna further alleges, however, that it was Nancy Goss, not Nestle, who filed the criminal complaint against him. McKenna does not allege that Nestle knew Ms. Goss was filing the complaint, that it encouraged her to do so, or that Nestle had any control over Ms. Goss as its former employee. Thus, McKenna has failed to state a claim for retaliation because he has not sufficiently alleged facts showing that Nestle was responsible for a materially adverse action taken against him.

Under Ohio law, a plaintiff claiming intentional infliction of emotional distress must show that 1) the defendant intended to cause emotional distress or knew or should have known that its conduct would result in serious emotional distress to the plaintiff; 2) defendant's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community; 3) defendant's conduct was the proximate cause of plaintiff's psychic injury; and 4) plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expect-ed to endure it. *Quintile v. Medina County*, No. 1:07CV2413, 2008 WL 2484173, at *8 (N.D. Ohio June 17, 2008) (citing *Ekunsumi v. Cincinnati Restoration*, Inc., 698 N.E.2d 503, 506 (Ohio Ct. App. 1997)).

McKenna alleges that Nestle caused him emotional distress by "instigating the filing of false criminal charges" and by sending McKenna's "emotionally distressed" email to Ms. Goss. As discussed

above, McKenna has not adequately alleged facts demonstrating that Nestle was involved in the filing of the criminal charges. Further, neither action was so extreme and outrageous as to give rise to a claim of intentional infliction of emotional distress.

McKenna's argument that he has stated a claim for negligent infliction of emotional distress lacks merit be-cause Ohio courts "do not recognize a separate tort for negligent infliction of emotional distress in the employment context." *Tschantz v. Ferguson*, 647 N.E.2d 507, 521 (Ohio Ct. App. 1994).

Accordingly, the district court's order and judgment granting defendant's motion to dismiss are affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

No. 09-3400

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN H. MCKENNA,

Plaintiff-Appellant,

v.

NESTLE PURINA PETCARE COMPANY,

Defendant-Appellee.

Feb 17, 2010

ORDER

Before: KEITH, DAUGHTREY, and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green

Clerk

III: STATEMENT OF CLAIM

My Statement of Claim, that I, Kevin H. McKenna am a:

1. Victim of discrimination, (IE - "retaliated" against) as a Title VII complainant, by Nestle Purina PetCare Co., by no less than, instigating the filing of false criminal charges against the me, for my filing charges unlawful discrimination (opposition) against Nestle Purina PetCare Co., and directly participating proceedings (participation) against unlawful employment practices by Nestle Purina PetCare Co. through and by the actions currently being brought against the Defendant in a Title VII, employment discrimination law suit, on record with this very Court, (Case No. C2-05-976).

2. Victim of intentional (or negligent) actions taken by Nestle Purina PetCare Co., against me, which inflicted emotional distress/harm upon me.

The facts detailed hereinafter and giving rise to this now new/separate Complaint transpired during the course of the litigation (IE- the "Discovery" period) within the still pending as Case No. C2-05-976 in the Federal District Court of Southern Ohio, Eastern Division.

Parties: Plaintiff - Kevin H. McKenna
(hereafter "McKenna")

Defendant - Nestle Purina PetCare Co.
(hereafter "Nestle")

Related Case: C2-05-976, on file with the Federal District Court of Southern Ohio, Eastern Division (hereafter "Case C2-05-976" when referring to Case C2-05-976, and "this Court" when referring to the Court)

Summary of Facts, which surround this Complaint:

1. McKenna was an employee of Nestle from October 15, 2001 through to October 14, 2004.

2. On August 31, 2004, While employed by Nestle, McKenna informed Nestle, that:

    a. He had gone to the Police, about a month prior, regarding a fellow-employee Nancy Goss.
    b. Nancy Goss has signs of instability and possible hostility against him.

3. On October 28, 2005, McKenna filed a formal Title VII complaint against Nestle with the Federal District Court of Southern Ohio, Eastern Division (Case C2-05-976), claiming that, among other things, that a co-worker, Nancy J. Goss, harassed McKenna, while employed by Nestle in 2004.

4. On November 21, 2005, Nestle directly responded to McKenna's October 28, 2005, formal Title VII complaint on file with the Federal District Court of Southern Ohio, Eastern Division, (Case C2-05-976) by Nestle filing its formal Answer to that same Title VII complaint.

5. On November 21, 2005, Nestle admitted, among other things in Nestle's Answer to McKenna's Complaint of case C2-05-976, in the Fall of 2004, that Nancy J. Goss's employment with Nestle was: "*terminated for being an "over threat", for harassing and threatening her co-worker(s)*".

6. Nancy J. Goss and McKenna were co-workers, employed by Nestle at the time Nancy J. Goss's employment was "*terminated for being an "over threat", for harassing and threatening her co-worker(s)*" with Nestle in 2004.

7. On February 1, 2006 @ 3:05 PM, McKenna sent notice to Nestle by electronic mail, explicitly informing Nestle that:

    a. "*Nancy J. Goss is perceived to be an "Overt Threat" by myself and my family*".
    b. "***(This document will be kept on record, so that in the case that a situation arises in the future, that you were expressly informed and REQUESTED to excercise due and reasonable care in regards to this matter)***".

8. On February 1, 2006 @ 10:12 PM, by means of electronic mail, Plaintiff notified Nestle that:

    a. "*Suffice to say, words can not properly express how intensely serious I am that EXTREME CARE MUST BE TAKEN if*

some sort of action is going to even indirectly (re)involve Nancy with me."

b. McKenna was, "*STALKED in complete absence of rational thought and behavior*" by Nancy J. Goss.

9. On February 2, 2006 @ 10:22AM, by means of electronic mail, Nestle affirmed receipt of the February 1, 2006 @ 10:12 PM email, by directly responding to the concerns expressed by McKenna within that communication regarding Nancy J. Goss.

10. On February 22, 2006 @ 1:36PM, by means of electronic mail, McKenna communicated to Nestle, his concerns of having his life (again) exposed Nancy J. Goss's perception of her relationship with McKenna.

11. On February 22, 2006 @ 1:38PM, by means of electronic mail, Nestle affirmed receipt of the February 22, 2006 @ 1:36PM communication, by Nestles response to McKenna with the contents of the February 22, 2006 @ 1:36PM communication by McKenna appended to Nestles response to McKenna on that date.

12. On or about April 14, 2006, Nestle was *formally* served, by means of a *Certified* (signed, notarized, and sworn to be true) response to the Nestle's formal Rule 33 Discovery Request in Case C2-05-976, where among other things, stated: "*The Plaintiff deems Nancy J. Goss to be STALKER, and therefore an overt threat to the Plaintiff's life*

and anything that may associate with the Plaintiff's life".

13. On June 16, 2006 @ 10:13AM, by means of electronic mail, McKenna informed Nestle (among other things) that:

    a. By means of documents within Nestle's possession, that Nancy J. Goss has a (documented) "*history of Psychiatric/ Psychological issues of which have required her to be under the care of a Therapist*"
    b. "*I advise you in all sincereity, do NOT expect a normal, reasonable, rationale response and/or reaction from Nancy Goss in a request for deposition.*"
    c. "*I have advised and warned you REPEATEDLY as to Nancy Goss's potentially hostile/violent irrationality, let this SERVE as my last best effort to have properly (warned) informed you.*"

14. On June 16, 2006 @ 4:49PM, by means of electronic mail, Nestle affirmed its knowledge of the matters communicated by McKenna on June 16, 2006 @ 10:13AM by directly electronically replying to that same (electronic) communication.

15. During the summer of 2006, Nestle was served copy of a document of Public Record, titled: "Supplementary Report", dated: "6/8/06", Inc.#: 0601125, of the Zanesville Police Department, where the Investigating and Reporting Officer

McIntyre stated in regards to his conversation with McKenna, that:

a. *"He stated that while at work, he was being, in his opinion, sexually harassed by a female employee there".*
b. *"According to McKenna, he was in fear that the whole situation may become violent at some time."*
c. *"He stated that he would just like to have note of it in case they did find his body, possibly floating in the river, the police would know who to go after."*

16. On July 24, 2006, Nestle and McKenna in Case C2-05-976, entered into an Agreed Protective Order.

17. On the three consecutive dates of October 17, 18 and 19 of 2006, Nestle was represented, as a party to, and did conduct sworn deposition of Nancy J. Goss in Case C2-05-976.

a. On October 17, 2006, at the very onset of the deposition Nancy J. Goss ("**Defendants Exhibit 1**"), Nestle initiated action(s) to instigate hostility of Nancy J. Goss towards McKenna, by introducing and directly calling Nancy J. Goss's attention to statements McKenna had previously made to Nestle within that electronic mail regarding Nancy J. Goss's emotional/ mental instability. (Paragraphs 2, 3 and 4 of an electronic mail sent to Nestle by

McKenna on June 16, 2006 @ 10:13AM, as is previously referenced within this Statement of Facts).

b. On October 17, 2006, during the deposition Nancy J. Goss, and on record, Nestle expressly entered into an agreement with Nancy J. Goss, and McKenna, that the deposition transcript of Nancy J. Goss be "sealed" until trial.

c. On October 17, 2006, during the deposition Nancy J. Goss, Nestle directly clarified that the Judge and Court Personnel would be able to view Nancy J. Goss's deposition transcript while under seal.

d. On October 19, 2006, Ms. Goss, during sworn deposition testimony, in the presence of Nestle, testified that by means of Ms. Goss's signed/sworn complaint to the Ohio Civil Rights Commission, had filed a known false complaint (of sexual harassment) against "The Times Recorder" of Zanesville, Ohio, with the Ohio Civil Rights Commission, at the time that it was filed.

18. On December 19, 2006, by means of electronic mail, Nestle affirmed its knowledge of matters communicated between McKenna and Officer Phillip B. McIntire of the Zanesville Police Department relevant to Nancy J. Goss.

19. On December 21, 2006, by means of electronic mail, Nestle affirmed its knowledge of matters

communicated between McKenna and Officer Phillip B. McIntire of the Zanesville Police Department relevant to Nancy J. Goss.

20. On January 13, 2007, Nestle sent a (responsive to a previous email) (sexually natured) email to McKenna.

21. On January 13-14, 2007, McKenna directly responded to Nestle's (sexually natured) harassing email, and sent several emails in response to Nestle's (sexually natured) email sent to McKenna.

22. On January 14, 2007 @ 2:15PM, McKenna informed Nestle, among other things, that :

    a. She (Nancy J. Goss) "*is THEE single most hostile entity I have ever encountered, and I WILL NOT CONFRONT her until I have completely resolved to myself that I am literally willing to take her life, in defense of my life, and/or those around me.*"
    b. "*THEN, since I will have attacked her dellusion(s), I must them prepare to defend the consequenses of that act.... and be prepared to defend my life, with my life, which I will do at that time*"

23. On January 14, 2007 @ 10:25PM, McKenna also sent an emotionally distressed email to Nestle, instigated by Nestle's (sexually natured) email.

a. This emotionally distressed email was directly responsive to Nestle's (sexually natured) email sent to McKenna by Nestle on January 13, 2007.

24. On January 19, 2007, Nestle filed Case C2-05-976, document #70, where Nestle filed a Motion with this Court to *unseal* the deposition transcript of Nancy J. Goss, among other things, for benefit of this Court (IE - Judge and/or other Court Personnel) to view the deposition transcript of Nancy J. Goss.

25. On January 19, 2007, Nestle filed Case C2-05-976, document #71 and an associated exhibit.

a. Court document C2-05-976 #71's exhibit (71-2), is a "forwarded" copy of the email sent by McKenna to Nestle on January 14, 2007 @ 10:25PM, with the (sexually natured) instigating email sent by the Nestle, to McKenna, *removed* from the context of the document/exhibit.

26. On January 19, 2007, Nestle made "electronic service" of a copy of a Case C2-05-976, document #70 to McKenna.

27. On January 19, 2007, Nestle made "electronic service" of a copy of Case C2-05-976, document #71 to McKenna, inclusive of all associated "exhibits".

28. On January 19, 2007, Nestle initiated service of a hard copy of Case C2-05-976, document #70 upon

McKenna by means of conventional ("ground") mail.

29. On January 19, 2007, Nestle initiated service of a hard copy of Case C2-05-976, document #71 inclusive of associated exhibit(s) upon McKenna by means of conventional ("ground") mail.

30. On January 19, 2007, Nestle initiated service of a hard copy of Case C2-05-976, document #70 upon Nancy J. Goss by means of conventional ("ground") mail.

31. On January 19, 2007, Nestle initiated service of a hard copy of Case C2-05-976 document #71, *absent* associated exhibit(s) related to Case C2-05-976, document #71 (document 71-2) upon Nancy J. Goss by means of conventional ("ground") mail.

32. On January 20, 2007 (approximately, Very Early AM), McKenna and Nestle engaged in multiple communications by means of electronic mail, where McKenna, among other things, *animatedly* attempted to halt service of associated exhibit(s) related to Case C2-05-976, document #71 (71-2) by Nestle, upon Nancy J. Goss.

    a. On January 20, 2007, by communication of electronic mails between McKenna and Nestle, McKenna animatedly demanded Nestle halt, and not make service of the exhibit associated with Case C2-05-976, document #71 (71-2) upon Nancy J. Goss, due to representations made by McKenna

within that email/exhibit, animatedly rebuking Ms. Goss's delusional perceptions/ representations of relationship with McKenna, as stalking and harassment.

b. On January 20, 2007, McKenna expressly informed Nestle, that service of the exhibit associated with Case C2-05-976, document #71 (71-2) upon Nancy J. Goss was, *"by doing so that it is perceived by me to be a direct threat to my life and physical well being"*.

c. On January 20, 2007, McKenna expressly informed Nestle, that service of the exhibit associated with Case C2-05-976, document #71 (71-2) upon Nancy J. Goss, that: *"This act is deened to be as much a THREAT to me and my life as sticking a loaded gun to my nose, it is completely intolerable"*.

d. On January 20, 2007, McKenna expressly informed Nestle, specific actions would be taken by McKenna, with this Court at the first available moment (IE - Monday morning, January 22, 2007) to halt Nestle's service of the exhibit associated with Case C2-05-976, document #71 (71-2) upon Nancy J. Goss.

33. On January 20, 2007(Very Early AM), Nestle represented to McKenna by electronic mail, that Nestle would be prepared to represent Nestle in any action(s) brought by McKenna before the Court on the Monday morning, of January 22, 2007.

34. On January 20, 2007 (approximately, Shortly After Noon), McKenna received hard copy service of Case C2-05-976, document #70, #71 and associated exhibit(s) by conventional ("ground") mail.

35. On January 22, 2007 at approximately 9:00AM, McKenna (accompanied by family, wife Linda and daughter Michelle, as witnesses to refute the representations/allegations made by Nestle to the Court) demanded to meet with *any* Officer of this Court, specifically to issue a Civil Protective Order and halt Nestle's service of the exhibit associated with Case C2-05-976, document #71 (71-2).

36. On January 22, 2007, at approximately 9:45AM, McKenna was granted a meeting at or about 11:00AM with a Judicial Officer of this Court to hear McKenna's requests to issue a Civil Protective Order and halt Nestle's service of the exhibit associated with Case C2-05-976, document #71 (71-2). ("Status Conference" between Case C2-05-976, Docket Items #72 and #73).

37. On January 22, 2007, at approximately 11:00AM, during the meeting with the Officer of this Court, the Officer was informed by McKenna that the purpose of the requested meeting, was to request the Court issue a Civil Protective Order, and in an attempt to halt service of the exhibit associated with Case C2-05-976, document #71 (71-2) by Nestle, upon Nancy J. Goss.

38. On January 22, 2007, during the meeting with the Officer of this Court, the Officer informed McKenna, that the Court did not have the authority to issue a Civil Protective Order of the nature being requested by McKenna.

39. On January 22, 2007, during the meeting with the Officer of this Court, the Officer of this Court stated he was willing to hear the issue to halt service of the exhibit (Case C2-05-976, document #71-2) by Nestle upon Nancy J. Goss.

40. On January 22, 2007, during the meeting with the Officer of this Court, the Officer directly asked Nestle if an "Agreed Protective Order" was in place between the parties, protecting against disclosure information deemed by either or both of the parties, to be confidential.

41. On January 22, 2007, during the meeting with the Officer of this Court, and in direct response to the relevant question posed by the Officer of this Court, Nestle had represented to the Officer of this Court, that an "Agreed Protective Order" was *not* in place between the parties.

42. On January 22, 2007, during the meeting with the Officer of this Court, Nestle had represented to the Officer that service of the exhibit(s) associated with Case C2-05-976, document #71 (71-2) had in fact *already* been executed upon Nancy J. Goss.

43. On January 22, 2007, the Officer of this Court dismissed the meeting based upon the

representation of Nestle that service of the Document had already been executed, citing that the Officer of this Court was incapable of stopping an event which had already occurred.

44. On January 22, 2007, at approximately 6:00PM (the same day of the meeting with the Officer of this Court), Nancy J. Goss conferred with Nestle, requesting service of the exhibit associated with Case C2-05-976, document #71, which had not been successfully served upon Nancy J. Goss by conventional ("ground") mail.

45. On January 22, 2007, at approximately 6:00PM, Nestle made *electronic* service of the exhibit (Case C2-05-976, document #71-2) to Nancy J. Goss.

46. On January 22, 2007, at approximately 6:26PM, based upon the information communicated by Nestle to Nancy J. Goss, Nancy J. Goss contacted the Muskingum County Sheriff's Department to file a criminal complaint against McKenna.

47. On January 22, 2007, at approximately 6:26PM, based upon the information disclosed by Nestle, Goss formally indicated to the Muskingum County Deputy Sheriff Paisley on sight, that she wanted to file formal charges criminal menacing against McKenna.

48. On January 22, 2007, at approximately 7:45PM, and in direct response to the complaint of criminal menacing filed by Nancy J. Goss against McKenna, the Muskingum County Deputy Sheriff Paisley visited the residence of McKenna

49. On January 22, 2007, at approximately 7:45PM the Muskingum County Deputy Sheriff Paisley stated to McKenna that based upon the exhibit (71-2) received by Goss, that the Deputy Sheriff was acting upon a complaint of criminal menacing by Nancy J. Goss against McKenna.

50. On January 22, 2007, In an attempt to avoid being arrested by the Muskingum County Deputy Sheriff Paisley for criminal menacing based upon the complaint filed by Nancy J. Goss, McKenna (and family members (*as witnesses*), wife Linda, and daughter Michelle) *all* emphatically informed the Deputy that very specific actions had been taken earlier that same day with a Judicial Officer of the Federal District Court of Ohio, in an attempted effort to halt Nestle's service of that exact same exhibit (71-2) upon Nancy J. Goss.

51. On January 22, 2007, In further efforts to avoid being arrested by the Muskingum County Deputy Sheriff Paisley, McKenna produced his laptop computer where this Courts docket on Case C2-05-976 was brought up on the spot by means of the PACER/ECF filing/access system, in order offer *irrefutable evidence* that the representation that this Court had indeed been involved by McKenna, in order to attempt to halt service of the exhibit which lead to the criminal complaint, and pending criminal charges. (Case C2-05-976 between docket items #72 and #73)

52. On January 22, 2007, Only after being presented with direct and irrefutable evidence (two other witnesses, and this Courts Docket for Case C2-05-

976 via PACER/ECF that service of the exhibit (71-2) by Nestle upon Nancy J. Goss, had been attempted to have been halted *by McKenna*, did the Muskingum County Deputy Sheriff finally deem that the immediate arrest of McKenna was not warranted at that time.

53. On January 22, 2007, had McKenna not taken a day off from work, demanded to see an Officer of this Court, and irrefutable, hard evidence not been available by witnesses and Pacer/ECF, McKenna would have been arrested for criminal menacing based upon the service of Case C2-05-976, document #71-2 upon Nancy J. Goss by Nestle on January 22, 2006 at approximately 6:00PM.

54. On January 23, 2007, at 9:05AM, McKenna filed an "Urgent Notice" with the Clerk of Courts, of this Court (Case C2-05-976, document #74) notifying this Court of further, subsequent actions taken by Nestle on Monday, January 22, 2007.

55. On January 23, 2007, at approximately 9:05AM, McKenna requested an additional exact copy of the Notice, with the Clerks *official time stamp*, was requested of, and provided by the Clerks of Courts Office of this Court, to as promptly as possible, file with the Muskingum County Sheriff's Department.

56. On January 23, 2007, at approximately 12:00PM, McKenna visited the Local Sheriff's Records Department, and emphatically requested the exact copy of the "Urgent Notice" (Case C2-05-

976, document #74) previously obtained by McKenna from the Clerk of Courts Office at approximately 9:05AM, be included in the Sheriffs records of the criminal complaint against McKenna.

57. On or about January 24-25, 2007, The Muskingum County Sheriff's Department determined that the statements communicated by McKenna to Nestle, within the private email sent by McKenna to Nestle (identified as exhibit(s) associated with Case C2-05-976, document #71 (71-2)) did not legally constitute an "overt threat" by McKenna against Nancy J. Goss.

58. On January 24, 2007, (*the very next day*) the Criminal Complaint, Criminal Charges and all Records against McKenna on file with the Sheriffs Department were forwarded to the Muskingum County Prosecutors Office.

59. On January 25, 2007, it was the finding of the Muskingum County Prosecutors Office, that the exhibit(s) associated with Case C2-05-976, document #71 (71-2), did not legally constitute an "overt threat" by McKenna against Nancy J. Goss.

60. On January 25, 2007, The Muskingum County Prosecutors Office, based upon the information on record, the criminal complaint filed by Nancy J. Goss and any/all relevant charges against McKenna were dismissed.

61. On January 26, 2007, McKenna seeks Professional, Medical relief of anxiety/emotional

distress, inflicted upon McKenna, by actions initiated by Nestle and subsequent events, beginning at January 19, 2007.

62. On January 26, 2007, McKenna's personal Physician, by direct examination of McKenna, concluded McKenna to be suffering from situational stress.

63. On January 26, 2007, based upon McKenna's personal Physicians diagnosis of McKenna, McKenna was immediately prescribed an anti-depressant/anti-anxiety medication.

64. On January 26, 2007, McKenna promptly tendered medications from a local pharmacy as prescribed by his personal Physician.

65. On January 26, 2007, McKenna initiated dosage of anti-depressant/anti-anxiety medication as prescribed to the Plaintiff.

66. On February 12, 2007, McKenna consults his personal Physician, that the January 26, 2007 prescription was wholly ineffective to relieving his symptoms of distress/anxiety/depression, and requested an alternative prescription.

67. On February 12, 2007, McKenna's personal Physician revised the Plaintiff's prescription to alternative anti-depressant/anxiety medication.

68. On February 12, 2007, McKenna promptly tendered medications from a local pharmacy as prescribed by his personal Physician.

69. On February 12, 2007, McKenna initiated dosage of the alternative anti-depressant/anti-anxiety medication as prescribed to the Plaintiff.

70. On February 16, 2007, McKenna further consults his personal Physician in regards to dosage of the alter-native anti-depressant/anxiety medication pre-scribed on February12, 2007 as ineffective to McKenna's symptoms.

71. On February 16, 2007, McKenna's personal Physician triples McKenna's initial dosage of the alternative anti-depressant/anxiety medication in an attempt to relieve McKenna's distress/ anxiety/depression.

72. From January 2007 through April of 2007, McKenna was maintained on prescription anti-depressant/anxiety medication.

73. From April of 2007 through approximately July, McKenna suffered multiple, symptoms of withdrawal from the prescription anti-depressant/ anxiety medication.

From: Kevin McKenna
Sent: Saturday, November 04, 2006 8:43 AM
To: Keith Schneider
Cc: Jon Secrest
Subject: NOTICE:

Gentlemen,

I am giving you notice, that if this case continues the path of no resolution, and progresses towards trial (with as grossly horrific as this case is), I will be required to seek expert witness(s) within the psychological field. While I am not an "expert", I lived and am living the experience, I know what happened, and in my layman's opinion, Nancy suffers from Erotomania, and unfortunately for me, she had idolized me since before my employment with Purina (IE - Interview).

Kevin H. McKenna
4885 Adamsville Road
Zanesville, Ohio 43701
kmckenn@columbus.rr.com
(740)452-3124 - Home

The World of Erotomania

by AmyM. 7/28/05

She stares at the phone. She knows it will ring. How can he not call her? He will come in due course, when the timing is right. He may not be around now but she knows he must miss her terribly. What will the

world think when they are finally together? It won't matter, not really, as long as they are one. She dreams of the day of their union, the day of their wedding, the day the world takes notice of how special she really is. Oh the things she will buy, the people she will meet, the destiny fulfilled! The room around her is in disarray. She barely notices. One day she will leave this all behind. He will save her from the harshness of her daily life and bring her a new, more exciting existence. She believes in fate. Her computer monitor flickers behind her. She leaves it on all day waiting for a message from him to appear on her screen. She stares again at the phone, sitting idle among the books and papers upon her desk. It will ring, oh yes, it will ring!

This sounds like the timeless story of lovers ripped from each other and working towards a reunion doesn't it? Well, it's not. The woman above is an extremely troubled soul. We often grow up thinking everyone in the world thinks as we do. This is often the basis for misinformation and misunderstandings. The truth is, not all humans operate under the same rules of reality. Troubled people veer from the beaten path for a variety of reasons. Sometimes mental illness is inherited, other times it is brought on by life experience, and sometimes the cause is unknown. The Internet has brought into focus some of these disorders and they are probably lurking in a chat room or on a message board near you. Many of these disorders aren't new; they have simply found a new outlet. One type of disorder that has found a new home on the Internet is Erotomania. This disorder is also called Clerambault Syndrome.

What is Erotomania?

This disorder is a form of stalking. The erotomaniac will not stalk just anyone. They focus their attention on someone in high social or financial standing. Quite often the object of the erotomaniac's obsession is a celebrity. Erotomania can be described as an imaginary and obsessive romantic interest in a stranger. In most cases they have never even met the victim. Thoughts of the victim tend to fill the daily thoughts of the affected. This goes far beyond normal daydreams and fantasies. Their mind spends a lot of time fabricating a relationship in great detail that simply does not exist. This type of person will justify just about any behavior they find themselves acting out. They often believe their victim to be stuck in a loveless relationship and they need to be rescued. This is not just a fantasy to the erotomaniac; it is their reality.

Erotomania often occurs on message boards and in chat rooms that are hosted by celebrities. They may spend endless hours waiting for the celebrity to post a message. The erotomaniac believes that their intended is sending them secret messages through posts on these message boards or showing up in the chat rooms under assumed names just to get the chance to speak with them. They feel this is their link to the celebrity and they begin to center their life around it.

Belief System

A person suffering from erotomania lives by the belief that they and the object of their affection will

be united one day. There is no middle ground to this thought. They truly believe it will happen. Quite often the erotomaniac will see any rejection as interference by a different party. They cannot believe their victim is really rejecting them. There must be someone else manipulating and controlling the victim's life choices. This could be a wife, husband, sister, brother, friend or co-worker. In some cases the erotomaniac will take their frustrations out on the imagined manipulator. They see them as someone who is standing in the way of their ultimate happiness.

The erotomaniac also functions under the belief that they are saving their victim from a dull and loveless existence. They will use every opportunity to make their victim "see the light". They are often convinced that their victim is disconnected from their emotions and don't yet realize that they are in love.

Why?

What happens in a person's mind that makes them cross the line? What turns affection or admiration into obsession? Feelings of affection can turn into feelings of rage, frustration, and in extreme cases, violence. The erotomaniac has quite literally lost touch with reality and refuses to accept rejection. A person afflicted with erotomania will often exhibit signs of schizophrenia or borderline personality disorders. Most often they hide these symptoms well and tell no one of their obsession simply because they see nothing wrong with it. People with this disorder often feel unloved and extremely unhappy in their daily lives. They combat these feelings by inventing a

relationship with someone that they feel will give them the life they could have or feel they should have. They often feel the object of their affection is their perfect spiritual match or what would be considered the perfect and truest love.

What type of Person?

Some of the traits of an erotomaniac are easy to spot but can be easily dismissed as someone who is depressed or having a rough time. They are often irritable, impulsive, obsessive, paranoid and prone to psychotic episodes. Though this disorder is seen mostly in women there are plenty of men that are affected. A person with this disorder tends to be lonely and socially inept. They often feel that they are unattractive and they have poorly paying jobs. These people are quite often awkward in social situations but feel free and unrestricted through the Internet. Though erotomaniacs do not often become violent, it is usually the men that do so.

Signs and Symptoms

If someone is trying desperately to get the attention of their victim they will not give up. They will post message after message on a message board in hopes of getting a direct reply from the target. When the celebrity in question is a traveler, the erotomaniac will venture from their home to try to make contact. Repeated and sometimes exhaustive attempts are made by the erotomaniac to gain access to the victim. These shy and socially inept people suddenly find the courage to pester bus drivers, security guards, and

even hotel staff in an attempt to locate the celebrity in the flesh.

The victim may have symptoms too. They are not having symptoms of being an erotomaniac; they have symptoms of being the victim. Quite often the victim will feel depressed, anxious, fearful, and totally out of control of their life. They will also begin to feel vulnerable in the presence of their stalker if they are able to get near. Erotomaniacs do not respect the personal space of their intended. To them, love is totally and completely without any personal boundaries. They may even try to force themselves into sexual situations with the victim. Even in cases where the erotomaniac can get nowhere near them, the victim will live in fear that they will run into them just around the next corner.

How to Deal

The victim should follow their instincts and gut feelings. Somewhere in childhood we are taught to think with our heads instead of listening to our hearts or our instincts. If something feels incredibly wrong, the victim should acknowledge that feeling and be on guard. The victim can ask the person to stop pursuing them, however this should only be done one time. If the victim repeatedly contacts the stalker, they are giving them the attention they crave. The person can be banned from participation on a particular message board or chat room, but this often fails to deter them. They simply make up a new username and carry on until they are detected yet again.

Restraining orders rarely work but one should be sought if the victim feels that they, their friends or their family are in any sort of danger. Quite often these roadblocks are seen as manipulations by outsiders rather then a clear statement by the victim. Friends and family should be reminded to be wary of any strangers. The very best thing the victim can do to get rid of this type of stalker is to ignore them completely. The erotomaniac should not be acknowledged in any manner or form. The victim's best hope is that the stalker will eventually lose interest and move on with their lives.

From: Kevin McKenna
Sent: Wednesday, January 17, 2007 7:21 PM
To: Brian Dickerson
Cc: Jonathan R. Secrest
Subject: The _ _ _ _ _ _ doesn't fall very far from the tree....

Mr. Dickerson,

Are you aware that this is a formal Title VII proceeding? Are you aware that this proceeding is in regards to my complaint in a reasonable and good faith belief that I was unlawfully being discriminated against (sexually harassed) by Nancy Goss? Would you please explain to me why it is that both Maguire and Schneider and Dickerson Law, legal representaives of the Defendant Nestle Purina PetCare Co. are actively acquising, soliciting, condoning, and arguably orchestrating the (negative) testimony from the perpurtrator of the alleged (reasonable and good faith complaint) harassment, for testimony that could potentially negatively reflect upon the complaintant? Are you aware that you, as counsel for the defendant would not be caring out these said acts if it were not, but for the fact that I have formally opposed what I believe to be a reasonable and good faith belief that this practice to be unlawful, by bringing this case/suit (C2-05-976) against Nestle Purina PetCare Co.? Are you aware that Title VII expressly PROHIBITS an employer from discriminating against an employee (past, present or future) for opposing unlawful employment practices? Would you please explain to me why it is I should have to answer to these ALLEGATIONS by and from my harasser for no other reason other than

I have oposed the unlawful acts of Nancy Goss and Nestle Purina PetCare? Would you please explain to me why this email which is immediately appended below this response does not constitue harassment and/or retaliation against me for opposing unlawful employment practices?

Would you PLEASE explain why it is that I should have to tolerate this retaliatory harassment for no other reason, "but for" the fact I have formally opposed what I reasonably, and in good faith believe are unlawful employment practices? Would you PLEASE explain to me why it is I should not file suit for these acts as (further) retaliation by the Defendant?

This is EXACTLY the same sort of acts the Defendant had immediately intiated against me on the evening of August 31, 2004, for no other reason that asserting my guarnteed Civil Rights as afforded by Title VII on that same date. You Mr. Dickerson, as Attorneys for, and in legal representation for the Defendant in this C2-05-976 case, are initiating AGAIN, on January 13, 2007.

You have crossed the line between Defense and Prosecution, Swords instead of Shields. Defense Counsel CLEARLY crossed the line in the deposition of Nancy Goss. You cannot "hide" my opposition now/this time, it is on record in Federal Court.

What is it you people do not understand about, filing a complaint of employment discrimination does *NOT* mean its "open season" on the complainant??? Do tell me why it is I shouldnt take select portions of the transcript together with this email to the Court

Kevin H. McKenna
4885 Adamsville Road
Zanesville, Ohio 43701
kmckenn@columbus.rr.com
(740)452-3124 - Home

From: Brian Dickerson
Sent: Saturday, January 13, 2007 12:46 PM
To: Kevin McKenna
Cc: Jonathan R. Secrest
Subject: RE: Only one grain of sand on the entire beach...

Mr. McKenna:

Thank you for your email and the citations to the first and fourth circuit case law. With such confidence in your case, why dont we just take your deposition and see what explanations you have for Ms. Goss' testimony and your use of Company time and services to not only seek relationships with other woman, but men as well. Maybe there is an explanation that makes sense. I have not heard nor seen it yet.

Brian

From: Kevin McKenna
Sent: Saturday, January 20, 2007 1:04 AM
To: Julie L. Bryan
Cc: Jonathan R. Secrest; Brian Dickerson
Subject: RE: McKenna v. Nestle Purina Co. C2-05-976
Importance: High

To ALL,

I have on record, the log of my telephone call to Brian Dickerson of Dickerson Law on Saturday, January 18, 2007 @ 12:45AM to the effect of the appended email. I have informed Mr. Dickerson NOT to forward ANYHTING to Ms. Goss which represents opposition to her delusional perseptions of our "relationship". I have indicated to Mr. Dickerson by doing so that it is perceived by me to be a direct threat to my life and physical well being.

THIS IS NO GAME, WE ARE TALKING ABOUT MY GENUINE PERCEPTION TO THE RISK OF THE LOSS OF MY LIFE AND/OR HEALTH.

YOU WILL NOT FORWARD ANY CORRESPONDENCE WHICH COULD REPRESENT TO MS. GOSS MY OPPOSIOTON OF HER DELUSIONS.

ATTACHED IS A COPY OF THE OFFICIAL POLICE REPORT ON FILE WITH THE ZANESVILLE POLICE DEPARTMENT IN JULY OF 2004 WHERE I HAD EXPRESSED CONCERN OF MY LIFE AT THAT TIME (IE - "a body floating down the river").

Dickerson Law is hereby on notice that I will be doing all within my ability to gain a protective order against the defendant in this matter. If you are DETERMINED to follow thourgh on this act, make arrrangements to hear this matter with the Court on the morning of Monday, January 22, 2007.

This act is deened to be as much a THREAT to me and my life as sticking a loaded gun to my nose, it is completely intolerable.

CEASE THIS ACTION IMMEDIATELY!

I will be doing everything within my ability to see that the Court is on notice of these acts by email and/or telephone, this is an atorcity!

Kevin H. McKenna
4885 Adamsville Road
Zanesville, Ohio 43701
kmckenn@columbus.rr.com
(740)452-3124 - Home

-----Original Message-----
From: Kevin McKenna
Sent: Saturday, January 20, 2007 12:41 AM
To: Julie L. Bryan
Cc: Jonathan R. Secrest; Brian Dickerson
Subject: RE: McKenna v. Nestle Purina Co.
Importance: High

ABSOLUTELY DO NOT MAIL THE CONTENTS OF THIS TO NANCY J. GOSS.

By doing so, I will take you acts/actions as a direct threat to my life. As I have previously stated to you, I have never and would never CONFRONT Nancy J. Goss's DELUSIONS without FIRST beign fuly prepared to guard my life with my life.

YOU *DO NOT* SEND THIS WITHOUT FIRST, PRIOR COURT CONSENT.

YOU MUST IMMEDIATELY NOTIFY ME IF THIS HAS ALREADY BEEN SENT TO NANCY J.GOSS, AS I WILL THEN INITIATE EMERGENCY MEASURES WITH LOCAL LAW ENFORCEMENT.

Kevin H. McKenna
4885 Adamsville Road
Zanesville, Ohio 43701
kmckenn@columbus.rr.com
(740)452-3124 - Home

-----Original Message-----
From: Julie L. Bryan
Sent: Friday, January 19, 2007 4:22 PM
To: KMCKENN@columbus.rr.com
Cc: Jonathan R. Secrest; Brian Dickerson
Subject: McKenna v. Nestle Purina Co.

Mr. McKenna:

Attached for your review is a Notice to the Court we have filed today.

Please contact Mr. Jon Secrest or Mr. Brian Dickerson if you have any further questions.

Julie L. Bryan
Litigation Assistant
5003 Horizons Drive
Ste 200
Columbus, Ohio 43220
Tel. 614.339.5375
Fax. 614.442.5942
www.dickerson-law.com

ZANESVILLE POLICE DEPARTMENT
332 SOUTH STREET
ZANESVILLE, OHIO 43701-3480
(740) 455-0700

SUPPLEMENTARY REPORT

DATE:	INC. #:
6/8/06	0601125

On 7/28/2004 I was dispatched to the front lobby of the police department where I spoke with one Kevin McKenna (address 4885 Adamsville Rd). McKenna stated that he was an employee of Benco Food Company, which is now Nestle Food on Main St. He stated that while at work, he was being, in his opinion, sexually harassed by a female employee there. McKenna stated that he thought that she had also followed him in a car after leaving work, had also witnessed her drive by his house where he lives. He stated that he tried to discourage it from the female of anything so as not to give her any reason to continue but she did not take the hint and desist. According to McKenna, he was in fear that the whole situation may become violent at some time.

He stated that he would just like to have note of it in case they did find his body, possibly floating in the river, the police would know who to go after. I informed McKenna that he needs to speak with his employer, Benco. I also advised him if the criteria fit for possible stalking, he could also possibly file

charges. I also advised him to also seek an attorney for a possible civil protection order. I informed McKenna that I did not know the terms for a civil protection order, but he needed to seek legal counsel to see if the attorney could possibly do something for his situation also.

McKenna stated that he did not wish to file any charges, he just wished to have the whole situation noted. I also informed McKenna that if he was in fear of his safety, to call the police, if he was within the city. I also spoke to him about having talked to a supervisor from the Times Recorder who I had spoke to who stated that he had a female employee that was being harassed by her soon-to-be ex-husband at work. He wished to have it noted or wished to have routines. He stated that he did not wish to make a report, she refused to make a report, but he thought the situation was serious enough that he would like to have routines at the Times Recorder. He also needed to know what the female employee could possibly do. I informed the supervisor that we would give routines and also possibly she should seek an attorney for a possible civil protection order. I also informed Mr. McKenna that the civil protection order criteria did fall underneath two people living together or being married, but as far as his situation, I was not clear as to the criteria for one in that situation, he again should also seek an attorney for any advice on how to proceed or have an attorney try to take care of the situation for him.

On 2/24/06 McKenna again came on station stating that he had been terminated by Benco Foods, that the situation had not stopped with the female that he

had worked with, and that a possible civil action was going to be taken. Any situation did arrive within the city where he was in fear of his safety of possible violence, to call the police department immediately. I also again advised Mr. McKenna that he may still wish to seek legal advice concerning the incident of any possible actions that could be taken. I informed Chief Lambes that a report would be made for Mr. McKenna concerning our conversation in 7/04 and also in 2/06.

Investigating Officer McIntyre

Report by Officer McIntyre

bjj

No. 10-21

In The

Supreme Court of the United States

KEVIN H. McKENNA,

Petitioner,

v.

NESTLÉ PURINA PETCARE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

Petitioner presents the question as, "Will the United States Supreme Court *please* grant the *pro se* petitioner in this case an exercise of this Court's supervisory powers." *Pet.*, p. i [emphasis in original].

A fair reading of the Petition reveals the actual Question Presented is whether the District Court improperly dismissed Petitioner's Complaint and whether the Sixth Circuit improperly affirmed this decision.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Nestlé Purina PetCare Company does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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SUMMARY OF ARGUMENT

Petitioner Kevin McKenna (hereinafter "Petitioner") fails to demonstrate any compelling reason for his Petition to be granted. Petitioner fails to proffer any argument in favor of granting his Petition other than he disagrees with the decisions of the District Court and Circuit Court. This Court settled the issue of proper pleading standards and the District Court and Sixth Circuit followed this Court's precedent. Further, Petitioner does not address how the lower court decisions fail to follow this Court's recent precedent.

The Sixth Circuit's decision does not conflict with the decisions of any other Circuit.

STATEMENT OF THE CASE

Petitioner identifies Ms. Nancy Goss (hereinafter "Goss") as "the perpetrator of *perverse* workplace stalking, sexual and retaliatory harassment victimizing Kevin H. McKenna (McKenna) in and out of the workplace . . . " *Pet.*, p. 2 [emphasis in original]. This is solely Petitioner's view of Goss. Goss and Petitioner were co-workers. Goss contends she and Petitioner engaged in an eleven month sexual affair. Petitioner contends their relationship was "a consensual but restricted, sexually erotic natured *workplace* friendship . . . " *Id.* at p. 4 [emphasis in original]. Petitioner also characterized the relationship as "consensual, sexual/erotic natured, up and down, on and off

again . . . " and as a "sex/sexually oriented work relationship . . . " *Pet. App. Brief*, p. 10 and p. 26. In short, Petitioner attempts to mischaracterize the relationship and avoid referring to it as a sexual relationship. It is clear, however, that Goss and Petitioner were not merely co-workers.

Respondent Nestlé Purina PetCare Company (hereinafter "Respondent") disputes Petitioner's statement, "The essence of this case, is the deliberate criminal actions taken by Nestlé's legal counsel[1] through it's [sic] access to pending Title VII litigation in the Federal Courts . . . " *Pet.* at p. 3. The essence of this case is Petitioner's threat against a material witness in Title VII litigation.

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[1] It should be noted the District Court cautioned Petitioner that his pleadings "move dangerously close to sanctionable behavior. Being a pro se litigant is not a license for McKenna to state and do whatever he wants." *Pet. App.*, p. 11a. The District Court also cited its prior warning to Petitioner:

> However, Mr. McKenna is advised, in the future, to be more temperate in his comments toward the conduct of opposing counsel. If he does choose to make statements impugning the honesty or integrity of such counsel and is not able to support such statements with a factual showing, sanctions may well be imposed in the future.

Pet. App., p. 12a. The Honorable Algenon Marbley concluded, "This serves as McKenna's final warning to temper his comments toward the conduct of opposing counsel. If McKenna continues to impugn the honesty or integrity of opposing counsel without factual support, sanctions will be imposed." *Id.*

During the course of litigation, Petitioner sent Respondent's Counsel an "(admittedly, overly) 'emotional . . . '" and "emotionally distressed . . . " email (hereinafter "the email"). *Pet. App. Brief,* p. 8. The email referenced Goss and posed the question, "Do I have to KILL this BITCH to get her the fuck off me?" *Pet. App.*, p. 2a. Goss previously provided two and half days of deposition testimony that included allegations that she and Petitioner engaged in an eleven month affair that included sexual acts performed in and outside the workplace; that Petitioner informed her he regularly engaged in extramarital affairs; that Goss and Petitioner engaged in sexual acts with another female co-worker; and, that Petitioner requested Goss find a suitable male so that he could experiment sexually. *Pet.*, p. 10; *Pet. App.*, p. 2a and p. 25a. Needless to say, Goss's deposition testimony did not reflect favorably on Petitioner. Petitioner was well-aware that Goss's deposition testimony would be utilized in Respondent's motion for summary judgment, and if the case proceeded to trial Goss would be Respondent's key witness.

Respondent did not request Petitioner send his "emotionally distressed" email but once Respondent received the email it was left with the quandary of what to do with it. In an abundance of caution, Respondent filed a Notice to the Court and attached the email as an exhibit. *Pet. App.*, p. 2a. This Notice was also sent to Goss. Respondent believed the Court and Goss were in a better position to determine whether Petitioner's email was a legitimate threat.

It bears mentioning that on January 8, 2007, Petitioner sent an email to Respondent's Counsel stating " . . . I am losing confidence in my emotional state/capacity, and may need her [Petitioner's wife] help to insure the journey does not end up in some sort of disaster. OH YA, one last thing, note the TIME on this email, yes, it is yet another 'sleepless night' because of this nightmare/atrocity. The INSANITY continues." [emphasis in original]. Petitioner then stated, " . . . I WILL NOT CONFRONT her [Goss] until I have completely resolved to myself that I am literally willing to take her life, in defense of my life, and/or those around me." *Pet. App.*, p. 27a.

After Petitioner states he is losing confidence in his emotional state and states he will resolve himself to taking Goss's life, Petitioner then questions whether he will have to kill Goss. Regardless of Goss's status as a material witness, she was entitled to notice of Petitioner's rants against her. As Judge Marbley noted, Goss was in the best position to determine whether Petitioner's rants were legitimate threats. *Pet. App.*, p. 9a. Apparently, Goss did determine the threat was legitimate and contacted local law enforcement. *Pet. App.*, p. 33a.

Based on Respondent serving Goss with a copy of the email, Petitioner filed a Charge of Discrimination against Respondent with the Equal Employment Opportunity Commission and Ohio Civil Rights Commission (hereinafter "EEOC" and "OCRC"). The EEOC and OCRC found no probable cause to believe discrimination occurred. Petitioner then filed a Complaint

in the United States District Court for the Southern District of Ohio. *Pet. App.*, p. 20a. Respondent filed a motion to dismiss that was granted by the District Court. *Pet. App.*, p. 1a-13a. The Sixth Circuit affirmed the District Court's dismissal of Petitioner's Complaint. *Pet. App.*, p. 14a-18a.

REASONS FOR DENYING THE PETITION

I. The District Court and Sixth Circuit Decision Are In Accord With This Court's Precedent In *Twombly*, *Iqbal*, and *Swierkiewicz*.

Petitioner believes that simply because he proceeded pro se the District Court could not dismiss his Complaint. Pro se plaintiffs are held to lesser pleading standards. *See Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). But, there are standards nonetheless. "Although civil litigants who represent themselves . . . benefit from various procedural protections not otherwise afforded to the attorney-represented litigant . . . pro se litigants are not entitled to a general dispensation from the rules of procedure." *Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996); *see also Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989) (pro se litigant "is subject to the relevant law and rules of court including the Federal Rules of Civil Procedure"); *Brazil v. U.S. Dept. of Navy*, 66 F.3d 193, 199 (9th Cir. 1995) (Pro se pleadings are subject to Rule 8(a)(2)). Petitioner's Complaint failed to conform to Fed. R. Civ. P. 8(a)(2)

because it did not contain a statement demonstrating an entitlement to relief and was properly dismissed.

Petitioner argues that the District Court disregarded the standards set forth by this Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). *Petition*, p. 25. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), this Court discussed *Conley's* statement that "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly,* 550 U.S. at 561, 127 S.Ct. 1955, quoting *Conley*, 355 U.S. at 45-46, 78 S.Ct. 99. As this Court noted, "We could go on, but there is no need to pile up further citations to show that *Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough." *Id.* at 562. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563. Effectively, *Twombly* abrogated *Conley*. As such, Petitioner's reliance on *Conley* is misplaced. In *Twombly,* this Court stated, "Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. Petitioner's Complaint did not contain any facts stating a claim for relief that was plausible on its face. Accordingly, the District Court was correct in dismissing Petitioner's

Complaint, and the Sixth Circuit was correct in affirming this dismissal. Accordingly, the Complaint was properly dismissed in accordance with this Court's established precedent.

A mere two years after the decision in *Twombly*, this Court issued its decision in *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009), which was cited by the Sixth Circuit in its decision.[2] *Pet. App.*, p. 15a. In *Iqbal*, this Court recognized that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949 (2009). Petitioner's Complaint was nothing more than "the-defendant-unlawfully-harmed-me accusation." Petitioner failed to set forth any facts demonstrating that Respondent did anything unlawful. Further, Petitioner failed to set forth any facts demonstrating an entitlement to relief.

In *Iqbal*, this Court held:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

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[2] Petitioner neglects to cite or discuss either *Twombly* or *Iqbal* in his Petition.

> reasonable inference that the defendant is liable for the misconduct alleged.

Iqbal, 129 S.Ct. 1937, 1949 (U.S. 2009) [internal citations omitted] citing *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. Petitioner's Complaint did quite the opposite. Instead of containing facts allowing the District Court to draw an inference that Respondent was liable for the misconduct alleged, the Complaint made it clear that Goss was responsible for the misconduct alleged. *Iqbal* is especially applicable to this case as *Iqbal* also considered allegations of discrimination. In *Iqbal*, plaintiff alleged an intent to discriminate, which this Court found to be a conclusory allegation. *Id.* at 1954. This Court noted, "Were we required to accept this allegation as true, respondent's complaint would survive petitioner's motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context." *Id.*

Courts are required to accept well-pleaded facts as true. In this case, Petitioner pled that Goss filed a criminal complaint against him and the Muskingum County Prosecutor declined to file formal criminal charges. There was no allegation that Respondent filed a criminal complaint. Petitioner concluded, however, the retaliatory action was the filing of false criminal charges. The allegations of the Complaint do not support this because they specifically state that no charges were filed. Further, Petitioner does not dispute that he sent an "emotionally distressed" email that referenced Goss and questioned whether he

would have to kill her. This email was not false. Likewise, Goss's reaction to this email was not false – she filed a criminal complaint. Under *Iqbal*, Petitioner was required to articulate facts that show he was entitled to relief. Petitioner utterly failed. To the contrary, the articulated facts clearly demonstrated that Petitioner was not entitled to any relief. The District Court and Sixth Circuit complied with the standards set forth in *Iqbal* when dismissing Petitioner's Complaint.

This case presents no novel issues for this Court to decide. The Petition only evidences Petitioner's disagreement with the District Court and Circuit Court's decisions. It is clear that Petitioner's Complaint contained numerous factual allegations, but Petitioner's Complaint demonstrated no entitlement to relief. Instead of being replete with legal conclusions, Petitioner's Complaint contained no legal basis at all. Petitioner merely recited facts and these facts could not support a claim for retaliation. The District Court correctly noted that "'factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.'" *Pet. App.*, p. 5a-6a, quoting *Twombly*, 550 U.S. at 544. Petitioner fails to address *Twombly* or *Iqbal* and fails to assert how the District Court and Sixth Circuit failed to comply with established precedent. For this reason alone, the Petition should be denied.

Instead of arguing proper pleading standards, Petitioner argues that "claims lacking merit may be

dealt with through summary judgment under Rule 56." *Pet.*, p. 26. Petitioner's argument is akin to the "careful case management approach" argument, which this Court flatly rejected. *Twombly*, at 559, 127 S.Ct. 1955. Petitioner omits any discussion of Fed. R. Civ. P. 8(a)(2), which requires a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed R. Civ. P. 8(a)(2). Further, Petitioner does not advance any argument that the Sixth Circuit departed from the standards set forth in *Twombly* and *Iqbal*.

Even more problematic for Petitioner is that the Sixth Circuit specifically cited to *Twombly* and *Iqbal* in rendering its decision. Further, the Sixth Circuit noted that pro se pleadings "'are liberally construed when determining whether they fail to state a claim on which relief can be granted.'" *Pet. App.*, p. 15a, quoting *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004). Obviously, the Sixth Circuit was well-aware of this Court's teachings in *Twombly* and *Iqbal* when rendering its decision and was cognizant of Petitioner's pro se status. The Sixth Circuit did not depart from established precedent in affirming the dismissal of Petitioner's Complaint.

In *Twombly*, this Court also discussed *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which Petitioner relies upon. Petitioner argues the dismissal of his complaint does not comport with this Court's decision in *Swierkiewicz*. As this Court noted, *Swierkiewicz* did not change the law of pleading. *Twombly*, 550 U.S. at

569-570. In *Swierkiewicz*, this Court reversed the dismissal of a Title VII complaint that contained allegations related to events leading to plaintiff's termination, included relevant dates, and included the ages and nationalities of individuals involved in the termination. *Id.* at 570. Despite these allegations, the complaint was dismissed for failing to allege facts the plaintiff would need at the trial stage to support a claim. *Id.*

Petitioner's Complaint failed to allege any facts demonstrating an entitlement to relief. Such is the case with many complaints filed in the many District Courts in the United States. The dismissal of Petitioner's Complaint was not novel and was not based on a departure of established law. There is simply nothing remarkable about this case that would warrant this Court exercising jurisdiction. *Swierkiewicz* does not support Petitioner's arguments because the Sixth Circuit determined Petitioner "has not sufficiently alleged facts showing that Nestlé was responsible for a materially adverse action taken against him." *Pet. App.*, p. 17a. Put another way, Petitioner did not comply with Fed R. Civ. P. 8(a)(2) and demonstrate he was entitled to relief.

In *Swierkiewicz*, this Court stated that an employment discrimination complaint need not set forth facts establishing a prima facie case. "We hold that an employment discrimination complaint need not include such facts and instead must contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Swierkiewicz*, 534

U.S. at 508. *Swierkiewicz* did not alter the requirement that a complaint demonstrate an entitlement to relief, which this Court recognized in *Twombly*. Granting Petitioner's request for review requests this Court to revisit its prior holding. Further, it is clear from Petitioner's Complaint that he did not show that he was entitled to relief. The District Court determined that Petitioner's Complaint was founded upon the filing of false criminal charges against him. The District Court noted that a review of the Complaint revealed no allegation that Respondent ever filed criminal charges against Petitioner. *Pet. App.*, p. 6a. To the contrary, Petitioner's Complaint specifically alleged Goss filed a criminal complaint against Petitioner. *Id.* The Sixth Circuit's decision does not conflict with *Swierkiewicz* because the Sixth Circuit did not require Petitioner to include facts establishing a prima facie case of retaliation.

The District Court also determined that Petitioner could not succeed on his retaliation claim because there was no allegation that false criminal charges were ever filed. *Pet. App.*, p. 7a. Again, the allegations of Petitioner's Complaint defeat any claim based on the filing of false criminal charges because Petitioner specifically alleged that no criminal charges were filed. *Id.* Further, the District Court's ruling determined that Petitioner could not establish that Respondent took any adverse action against Petitioner because Petitioner specifically alleged that Goss was the only individual that took any action against him. From the facts alleged in Petitioner's

Complaint, it was clear Petitioner did not state a claim entitling him to relief.

The Sixth Circuit specifically determined that Petitioner "failed to state a claim for retaliation because he has not sufficiently alleged facts showing that Nestlé was responsible for a materially adverse action taken against him." *Pet. App.*, p. 17a. The Sixth Circuit did not affirm dismissal because Petitioner failed to plead a prima facie case of retaliation. Rather, the Sixth Circuit affirmed dismissal because Petitioner failed to set forth facts demonstrating an entitlement to relief. Had Petitioner simply alleged that Respondent caused a criminal complaint to be filed against him because he engaged in protected activity then arguably such allegations would have withstood a motion to dismiss. Petitioner, however, clearly alleged that Goss filed a criminal complaint against him, not Respondent. The Sixth Circuit's decisions comports with *Swierkiewicz*, which did not alter pleading standards but merely determined that heightened pleading was not required in employment discrimination complaints.

In *Swierkiewicz*, this Court stated, "This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Swierkiewicz*, 534 U.S. at 508. This Court then held, "We hold that an employment discrimination complaint need not include such facts and

instead must contain only a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* citing Fed R. Civ. P. 8(a)(2). In *Swierkiewicz*, this Court considered the Second Circuit's decision that affirmed the dismissal of a complaint because the allegations were "insufficient as a matter of law to raise an inference of discrimination." *Swierkiewicz v. Sorema, N.A.*, 5 Fed.Appx. 63, 65 (2d Cir. 2001). In this case, Petitioner's allegations were not insufficient. Rather, Petitioner's allegations sufficiently demonstrated that he could not state a claim upon which relief could be granted. While Petitioner was not required to assert facts establishing a prima facie case of retaliation, the District Court was not required to permit this case to proceed to discovery when it was clear Petitioner could not establish a prima facie case of retaliation regardless of the facts developed through discovery.

It is the employee's burden to present evidence that raises an inference of discrimination. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-253, 101 S.Ct.1089, 67 L.Ed.2d 207 (1981). While a plaintiff need not set forth facts clearly establishing all elements of a prima facie case to survive a motion to dismiss, if the complaint makes it clear that the plaintiff cannot establish a prima facie case then a court must grant a motion to dismiss. "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v.*

King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

This Court settled the standard of proper pleading in a discrimination complaint and the District Court and the Sixth Circuit properly followed this standard. Neither Court required Petitioner to include specific facts establishing a prima facie case. Instead, both Courts determined that the facts Petitioner alleged clearly demonstrated Petitioner could not establish the essential elements of a claim for retaliation.

The District Court and Sixth Circuit's decision follow this Court's precedent in *Twombly* and *Iqbal*, which require a complaint comply with Fed. R. Civ. P. 8(a)2) and show the pleader is entitled to relief. Petitioner's Complaint did not show that he was entitled to relief and was properly dismissed.

II. This Court Settled Issues Related To Proper Pleading Standards And Petitioner Advances No Argument The Sixth Circuit Did Not Follow These Standards.

The arguments contained *infra* are precisely why this Court should not accept jurisdiction. The parties are arguing whether Petitioner's Complaint was properly dismissed; the parties are arguing proper pleading standards; the parties are not arguing for an extension or retraction of existing law or requesting this Court resolve a split amongst the Circuit Courts. Petitioner fails to recognize that this is the United

States Supreme Court. This is not the proper forum to simply rehash arguments already made to the lower courts and properly analyzed by the lower courts in accordance with well-established precedent simply because Petitioner disagrees with the rulings of the lower courts.

This Court settled the issue of what is the proper pleadings standard, and did so recently in two separate decisions. Granting Petitioner's Writ would result in revisiting this Court's decisions in *Twombly* and *Iqbal*. Petitioner attempts to cast this case in the light of a District Court and Appellate Court departing from established standards of review, but Petitioner fails to address *Twombly* or *Iqbal*. Petitioner fails to assert any compelling reason for this Court to review the Sixth Circuit's decision.

Petitioner's position would render courts powerless to dismiss a complaint filed by a pro se plaintiff. Petitioner's appeal to this Court that as a pro se plaintiff his Complaint must stand is as meritless as Petitioner's argument that if he were African-American and the presiding District Court Judge was white (instead of vice-versa) then the outcome of this case would have differed and had it not, there would have been national riots. *Pet. App. Brief*, p. 23. Petitioner's reasoning leads to the inevitable result that a court could never dismiss a Title VII Complaint because courts would not be permitted to evaluate whether a plaintiff could state a claim. Granting the Petition would result in holding employer's liable for acts of former employees. The actions of former

employees are impossible to police and restrict as employers have no control over them, just as Respondent had no control over Goss. Further, granting the Petition would restrain a litigant's ability to inform a witness of a potential threat against that witness.

III. The Sixth Circuit's Decision Does Not Conflict With The Decision Of Another Circuit Court.

In an attempt to convince this Court to accept the Petition, Petitioner argues that the Sixth Circuit's decision conflicts with the decision of the Tenth Circuit Court of Appeals in *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996). In *Berry*, Jerald Reynolds (hereinafter "Reynolds") was employed by defendant as a new car sales manager. During this time, two co-workers were allocated bonuses; Steve Szekula (hereinafter "Szekula") was one of these co-workers. Szekula left employment with defendant prior to receiving his bonus. Reynolds paid Szekula the bonus out of his own pocket and on or about May 4, 1989, instructed a secretary to endorse Szekula's name on the bonus check once it arrived. Reynolds then cashed the bonus check. *Id.* at 983.

In August 1989, defendant terminated Reynolds. In February 1990, Reynolds met with Szekula for lunch and informed Szekula he was contemplating filing an EEOC Charge of Discrimination against defendant. *Id.* at 984. Contrary to customary hiring

practices and despite Szekula's file being flagged with a "not for rehire" notation, defendant's owner rehired him and offered him a management position.

Reynolds filed a Charge of Discrimination on March 1, 1990. *Berry v. Stevinson*, 804 F.Supp. 121, 129 (D. Colo. 1992). The defendant received notice of the Charge on March 7, 1990. *Id.* at 130. On March 30, 1990, Szekula contacted the Sheriff's office to complain of forgery related to the bonus check. Criminal charges were then filed against Reynolds and he was ultimately acquitted. Reynolds filed a retaliation claim that proceeded to trial.

The factual distinctions between *Berry* and the present case are evident. Szekula worked for defendant and was under the control of defendant when he filed the forgery complaint. Goss had not worked for Respondent for over two years when she filed the criminal complaint against Petitioner. Further, the Tenth Circuit's decision in *Berry* focuses on whether a former employee may bring a claim for retaliation. *Berry*, 74 F.3d at 985. There is no dispute in this case that a former employee can bring a claim of retaliation. *Berry* simply did not confront the issue of whether a former employee can bring a claim for retaliation when the alleged retaliatory action was taken by another former employee. As such, the Sixth Circuit's decision is not at odds with *Berry* and there is no conflict.

The Tenth Circuit later clarified its decision in *Berry* and stated, "Filing false criminal charges

against, or the malicious prosecution of, an employee can constitute an adverse employment action." *Dick v. Phone Directories Co., Inc.*, 397 F.3d 1256, 1269 (10th Cir. 2005). In *Dick*, the Tenth Circuit determined the plaintiff could not establish any adverse action was taken against her because co-workers complained to the police department but "no formal charges have been brought against her." *Id.* The Tenth Circuit stated, "We agree with the reasoning of the District Court and hold that the police report in this case is not an adverse employment action." *Id.* Unlike the facts of *Berry*, the facts of *Dick* are similar to the facts of this case and the court determined no adverse action was taken. Despite Petitioner's arguments, the Tenth Circuit's decisions are in line with the Sixth Circuit's decision in this case.

There would be no claim for retaliation even if Respondent, instead of Goss, filed the police report. A truthful report to police about an employee does not constitute adverse action to support a retaliation claim. *Aviles v. Cornell Forge Co.*, 241 F.3d 589, 593 (7th Cir. 2001). Even if the facts of this case were different and Respondent itself filed the police report, Petitioner could not have stated a claim for retaliation.

IV. The Court Should Not Withhold Ruling Pending The Outcome Of *Staub v. Proctor*.

Petitioner requests this Court withhold any ruling in this case until a decision is rendered in *Staub*

v. Proctor, Case No. 09-400. It is perhaps fitting that a case in which Respondent, a pet food manufacturer, is involved has now been linked to a fable involving a monkey and a cat. It is also not surprising that Petitioner is now knocking on the door of the highest court in the land given Petitioner's prior representation:

> Be it said and heard, here and now: Regardless of the pain and suffering my family and I have, and continue to endure(d) regarding this discrimination lawsuit, so long as blood flows through my veins, and breath through my lungs, I shall never cower to this TYRANNY that is known as "Nestle."

Pet. App. Brief, p. 30 [emphasis in original].

Petitioner's attempt to fit the facts of this case into the "Cat's Paw Theory" is misguided, at best. As this Court is well-aware, the Cat's Paw Theory is derived from the "Monkey and the Cat" fable authored by Jean de La Fontaine. *Staub v. Proctor Hosp.*, 560 F.3d 647, 650 (7th Cir. 2009). In this fable, the clever monkey persuades the unsuspecting cat to snatch chestnuts from a fire. In doing so, the cat burns its paws and the monkey enjoys the chestnuts.

The Cat's Paw Theory now refers to a means of proving discrimination when the actual decisionmaker is unbiased, but the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker. The unsuspecting decisionmaker (the cat) has now carried out the unlawful motives of the

nondecisionmaker (the monkey). There are, of course, varied applications of the Cat's Paw Theory among the Circuit Courts.

Petitioner claims the facts of this case are similar to the issues this Court will confront in *Staub*. There is, however, nothing similar in these cases. In *Staub*, petitioner alleged he was discriminated against based on his military service. *Id.* The case proceeded to trial. At trial, Staub produced evidence of the discriminatory animus of his supervisor. Staub produced evidence that actions taken by this supervisor influenced his ultimate termination.

Petitioner cannot point to any discriminatory conduct by Respondent, there is no supervisor, and there is no decisionmaker under Respondent's control. In this case, Goss, who was not an employee of Respondent at the time, filed a criminal a complaint against Petitioner. Respondent did not file this criminal complaint against Petitioner; Respondent's Counsel did not file this criminal complaint against Petitioner; and, there is no allegation that Respondent possessed any control over Goss. A non-party over whom Respondent had no control filed a criminal complaint against Petitioner. There was no fabled monkey directing Goss to file these charges, which is made clear by Petitioner's Complaint. As such, there is no justification for withholding ruling on this case pending the outcome of *Staub*.

V. Petitioner Attempts To Raise Issues Not Addressed By The Lower Courts.

Petitioner attempts to raise issues regarding Respondent's harassment of Petitioner. *Pet.*, pp. 10-12. These issues were not raised in front of the District Court or the Circuit Court and not addressed by the lower courts. This Court routinely declines to decide issues not raised in the lower courts. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001). Accordingly, Respondent requests this Court not address issues not raised in the lower courts the Petitioner attempts to raise in his Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 10 2010
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No. 10-21

In the Supreme Court of the United States

KEVIN H. MCKENNA *(Pro-Se)*

Petitioner,

v.

NESTLE PURINA PETCARE COMPANY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Kevin H. McKenna
Petitioner – Pro-Se
4885 Adamsville Road
Zanesville, Ohio 43701
(740) 452-3124

August 7, 2010

QUESTION PRESENTED

Because the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, *and* sanctioned such a departure by a lower court, the petitioner humbly requests:

Will the United States Supreme Court *please* grant the *pro se* petitioner in this case an exercise of this Court's supervisory power?

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PETITIONERS REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

I. Summary of Position:

Respondents' Opposition Brief completely fails to address the perversely wrongful standards applied by the Respondent and the lower Courts' in dismissal of McKenna's emotional/psychic harms which McKenna inarguably suffered as direct result of Respondent's actions. Petitioner effectively concedes Petitioner sexually harassed McKenna, but "requests" this Court not address the issue, *but for* Respondent fraudulently misrepresents the issue was not before the lower Courts. Respondent does not dispute Respondent's Counsel of Record perpetrated acts of fraud and evidence tampering upon the District Court and upon Goss, a third-party.

Respondent argues, "There is simply nothing remarkable about this case that would warrant this Court exercising jurisdiction" (*Opp. Br.*, p. 11, ll. 15-17). This case is so remarkable it defies imagination of reasonable people. This case is a "cat's paw" scenario where the "smart monkey" is Respondent's legal counsel, who under color of law, perpetrated acts of fraud and evidence tampering upon a Federal District Court and a third-party as the "unsuspecting cat(s)", as perverse means to cause wrongful adverse action(s) against a Title VII litigant.

McKenna does not seek to hold employers liable for acts of "former employees" (*Opp. Br.*, end p. 16, to begin p. 17). McKenna simply seeks to hold employers liable for *any* "clever" act(s) of its agents, using *any* third party, "former employee" or *not*, as a "cat's-paw" to punish Title VII litigants.

McKenna's position in this case is perfectly inline with this Court's holding that; "An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm outside the workplace." *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2412 (2006).

II. "Attorney Misconduct" Conflict of Interest:

McKenna could not raise this issue prior to Respondent's Appearance of Counsel. Accordingly the issue has just now ripe to raise before this Court. Jurisdiction of this case arises from U.S. District Court, Southern District of Ohio. As such, the *Ohio Rules of Professional Conduct* (ORPC) govern the conduct of the Attorneys in this case.

Both Dickerson and Secrest as identified as "Counsel of Record" on the cover of the Respondent's Brief in Opposition, are the same individuals who McKenna *evidences* [1] perpetrated acts of fraud, evidence tampering, upon the District Court and a third party as a means to impose extremely perverse acts of retaliation against McKenna. Accordingly it is inarguable that Respondent's Counsel of Record are material witnesses in *this* case. Not only does this evidence "unbecoming" conduct; ORPC Rule 3.7(a) states: "A lawyer shall *not* act as an advocate at a

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[1] Statement #23 at Appendix p.28, Case: 2:08-cv-**00253**-ALM-TPK Doc #: 9-1 Filed: 04/14/08 Page: 41 of 45 PAGEID #: 86 (un-redacted email),

- Compare to: -

Statement #25 at Appendix p.28, **Case: 2:05-cv-00976**-ALM-TPK Doc #: 71-1 Filed: 01/19/07 Page: 2 of 2 PAGEID #: 856 (**redacted** email)

trial in which the lawyer is likely to be a necessary witness ...".

Accordingly, McKenna respectfully requests this Court dismiss any representations made by Brian E. Dickerson and Jonathan R. Secrest as advocates in this proceeding.

III. FRAUD - From Front Cover, to Back Cover.

A. Front Cover - Fraudulent "Corporate Disclosure Statement"

McKenna is *not* a financial expert, thus McKenna's assertions on this subject are not dispositive. However, "common sense" dictates it is *brutally* obvious that the economic giant known as "Nestle" has vested interest in a company by the name of "*Nestle* Purina PetCare Co.".

Page "ii" of Respondent's Brief states: "Respondent Nestle Purina PetCare Company *does not have a parent corporation*". However, that representation is not only contrary to common sense that "Nestle" has vested interest in a company by the name of "*Nestle* Purina PetCare Co.", but is also contrary to facts asserted on *Nestle* Purina's Internet web-site

> "On December 12, 2001, Ralston Purina Company was acquired by Nestlé S.A. Ralston Purina was then merged with a subsidiary of Nestlé. The resulting company, Nestlé Purina PetCare Company, is not a publicly traded company. Nestlé Purina is a wholly-owned subsidiary of Nestlé Holdings, Inc., which is

owned by Nestlé S.A., Avenue Nestlé 55, 1800 Vevey, Switzerland."

(http://www.nestlepurina.com - 08/06/2010)

Furthermore, According to the "Financial Statements 2009" available at the right-hand side of the "Investor Relations" web-page [2] of Nestle's Internet web-site, "*Nestle*" holds "**100% capital shareholdings**" in "Nestlé Purina PetCare Company St. Louis (Missouri)".

B. Back Cover - Fraudulent "Issues Not Raised Before the Lower Courts"

On the last page (p. 22) of the Respondent's Opposition Brief, Nestle fraudulently asserts: "Petitioner attempts to raise issues regarding Respondent's harassment of Petitioner. *Pet.*, pp. 10-12. These issues were not raised in front of the District Court or the Circuit Court.".

Ironically, that is *essentially* the same argument Nestle made to the Circuit Court on May 21, 2009 when McKenna had not only *previously* raised the issue before the Circuit Court, but McKenna had also articulated how that issue was *also* sufficiently raised before the District Court:

> "This conversational email exchanged *ensued only after McKenna was being sexually harassed by none other than Nestle/Dickerson*, based upon, and only after, an instigating/

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[2] http://www.**nestle**.com/InvestorRelations/Investor+Relations.htm: At the right-hand side of the Internet web-page "Documents" – "**Financial Statements 2009**". Please see the 92nd page of the PDF document, identified as page "131".

> harassing email sent to McKenna by **Nestle/ Dickerson on January 13, 2007 @ 12:46 PM,** where Dickerson, as legal counsel for Nestle states: "*... and see what explanations you have for Ms. Goss's testimony... ... to not only seek relationships with other woman, but men as well.*" (R. 2, Complaint, p. 7, Statement #20, please see also, R. 9-2, p. 36-45, with particular emphasis on the composition of *Id.* at **bottom of p. 40,41**). Nestle's/Dickerson's January 13, 2007 harassing email/ comment(s)." (emphasis in original) [3].

Nestle cannot plead ignorance to this issue being raised before the Circuit Court, Nestle drafted an entire section specifically responding to McKenna raising that issue:

> "**F. No Claim for sexual harassment was pled in the Complaint.**
>
> Now, for the first time, McKenna attempts to allege that Nestle, through its legal counsel, was sexually harassing McKenna. Brief, p. 7. *This is simply ridiculous* and demonstrative of McKenna's lack of legitimate claims. McKenna is clearly taking the proverbial "shotgun approach" and hoping this Honorable Court finds reason to remand this case." [4].

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[3] Case: 09-3400 - Document: 00615539197 - Filed: 05/21/2009 – Docket Page: 8; [Numbered as *Appellant Brief* p. 7]

[4] Case: 09-3400 - Document: 00615574113 - Filed: 06/19/2009 - Page: 29

It is inarguable that Nestle knows this issue was raised before the Circuit Court.

Nestle's known to be false representation, of existing material facts, with intent of misleading this Court, with justifiable reliance upon a representation made upon this Court by a member of the Bar of this Court, results in Harm to McKenna, by this Court otherwise disregarding McKenna legitimately raising the issue before this Court; is the very definition of FRAUD.

IV. Respondent's Egregious Violation of a Standing Protective Order [5].

On page 3 of Respondent's Opposition Brief, Nestle references McKenna's harasser stating, "Goss previously provided two and a half days of deposition testimony that included allegations...". Nestle then sensationalizes Goss's *uncorroborated* vile laundry list of allegations against McKenna. Nestle is again attempting to fabricate a non-existent "causal connection" from Goss's deposition testimony to McKenna's "emotionally distressed" email. Nestle simply lusts over any opportunity to harass McKenna.

The simple fact is that the "causal connection" is inarguable [6]. Obviously McKenna's "emotion-ally distressed" email is in *direct opposition* to Dickerson's sexually harassing email plain and simple. That is exactly why Nestle's Legal Counsel engaged in unlawful evidence tampering by

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[5] Case: 2:05-cv-00976-ALM-TPK Doc #: 77 Filed: 02/05/07 Page: 11 of 11 PAGEID #: 910

[6] Doc #: 9-1 Filed: 04/14/08 Page: 41 of 45 PAGEID #: 86

redacting that email, and by further perpetrating fraud upon the District Court and Goss to cause wrongful adverse actions against McKenna.

The District Court's issuance of a standing Protective Order on exactly these subjects obviously cannot deter Nestle. After SIX YEARS *and* a Court Order, it is clear, Nestle will not stop harassment of McKenna. Now, after SIX YEARS of Nestle's sponsoring harassment of McKenna, McKenna asks again: What does McKenna have to do to finally end Nestle sponsored sexual harassment of McKenna?

> "Thus, the current state of the record supports Mr. McKenna's request for a protective order on these subjects." [7].
>
> "Since Nestle does not argue that the ruling on these issues was either clearly erroneous or contrary to law, *that ruling will be upheld.*" [8].
>
> "Defendant's motions for reconsideration (#78)... ...DENIED" [9].

On August 07, 2006 McKenna filed a Motion for a Protective Order limiting the scope of matters, which may be raised within the proceedings. McKenna's motion specifically cited "**Future Discovery (Deposition):**", and in specific regards to Nestle's upcoming intrusive deposition of Nancy J.

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[7] Doc #: 77 Filed: 02/05/07 Page: 11 of 11 PAGEID #: 910
[8] Doc #: 97 Filed: 09/24/07 Page: 4 of 8 PAGEID #: 1410 at ¶2
[9] Doc #: 97 Filed: 09/24/07 Page: 8 of 8 PAGEID #: 1414

Goss [10]. The matter was fully briefed on August 31, 2006 [11].

On October 06, 2006 McKenna pleaded with the District Court to "expedite" ruling on McKenna's motion for a Protective Order [12].

On October 17, 18, and 19, 2006 Nestle conducted unabated deposition of Goss including those matters prohibited by the scope of the Protective Order McKenna sought to have in place *months prior* to conducting depositions.

On February 05, 2007 the District Court GRANTED McKenna's motion for a Protective Order.

> "[T]he Court does not believe that inquiries concerning Mr. McKenna's relationship history have anything to do with the single claim of discrimination propounded in this case relating to a very abbreviated time frame between when he first notified Nestle officials that he was being harassed by Ms. Goss and when his employment was terminated, a period of less than two months. Further, they do not relate to the proffered reason for Mr. McKenna's termination, nor would it appear that they are an effort to *acquire evidence* which, if it had been known to Nestle at the time, would have supported the termination of Mr. McKenna's employment. It does not appear that Nestle would have refused to hire, or would have discharged, individuals who either engaged in extramarital affairs or who

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[10] Doc #: 51 Filed: 08/07/06 Page: 4 of 8 PAGEID #: 687
[11] Doc #: 57 Filed: 08/31/06
[12] Doc #: 60 Filed: 10/06/06

> fathered children out of wedlock. Thus, the current state of the record supports Mr. McKenna's request for a protective order on these subjects." (emphasis added) [13]

On February 15, 2007 Nestle filed a desperate Motion for Reconsideration regarding the District Court's Protective Order. Nestle *specifically* cited virtually verbatim those same sexual matters before the District Court, which Nestle again raised before this Court on page 3 of the Respondent's Brief! As Nestle themselves stated, "Nestle is now precluded from seeking further [litigating] on these issues" [14].

On September 24, 2007 the District Court affirmed stating, "Since Nestle does not argue that the ruling on these issues was either clearly erroneous or contrary to law, *that ruling will be upheld.*" [15]. "**Defendant's motions for reconsideration (#78)... ...DENIED**" [16].

In sum, a standing Protective Order is in place prohibiting Nestle from further harassing McKenna on these issues. Nestle remains undeterred by Orders of the Federal Judiciary in Nestle's resolve to impose unlawful harassment upon McKenna.

Nestle's message is unmistakable; Nestle will do as Nestle pleases, and there is nothing McKenna or the Federal Courts can do to stop them.

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[13] Doc #: 77 Filed: 02/05/07 Pages: 10-11 of 11 PAGEIDs #: 909-910

[14] Doc #: 78 Filed: 02/15/07 Page: 5 of 8 PAGEID #: 918 at ¶ 3

[15] Doc #: 97 Filed: 09/24/07 Page: 4 of 8 PAGEID #: 1410 at ¶2

[16] Doc #: 97 Filed: 09/24/07 Page: 8 of 8 PAGEID #: 1414

V. Respondent's Diatribe on *Twombly* is Inapposite to the Material Issues in the Case:

Nestle's diatribe on *Twombly* spanning an unbelievable ten (10+) pages of Respondent's Opposition Brief is nothing more than a excruciatingly painful attempt at creating a red herring, and is best left forgotten!

A. *Twombly* is Inapposite to Petitioner's Reliance on *Conley*:

To be Clear: McKenna's stated reliance upon *Conley* has nothing to do with the "no set of facts" language that *was* discussed by this Court in *Twombly*, and has everything to do with, "The Federal Rules reject the approach that pleading is a game of skill..." language in *Conley* relied upon by this Court in *Foman v. Davis*. (*Pet. Br.*, pp. 25-26).

Nestle's conclusory assertion that, "Effectively, *Twombly* abrogated *Conley*. As such, Petitioner's reliance on *Conley* is misplaced" is utterly laughable! (*Opp. Br.* p. 6, ll. 23-24). McKenna's stated reliance on *Conley* has nothing to do with the *Conley's* "no set of facts" language as *was* discussed by this Court in *Twombly*.

B. *Twombly* is Not the Legal Basis Relied Upon by Lower Court's in Dismissal of McKenna's Complaint:

To be clear: Nestle, the District and Circuit Courts specifically relied upon the fact that McKenna had allegedly failed to allege a "*prima facie*" case of retaliation. The lower Courts held McKenna's

pleading requirements to inapposite *summary judgment* evidentiary standards (Appendix p. 6, and p. 16, respectively). In support of that judgment, the District and Circuit Courts both cited *differing* summary judgment evidentiary standards to support that McKenna had failed to allege a "*prima facie*" case (*Fenton v. HiSAN*, 174 F.3d 827, 831 (6th Cir. 1999), and *Hawkins v. Anheuser- Busch, Inc.*, 517 F.3d 321, 345 (6th Cir. 2008) respectively).

Now the Respondent lobbies this Court to now hold McKenna's *pro-se* complaint under a new *Twombly* standard most favorably to the Respondent. *Twombly* is not the standard relied upon by Nestle and the lower Courts in dismissal of McKenna's Complaint. The lower Courts did *not* discuss the *plausibility* of McKenna's Complaint as contemplated by this Court in *Twombly*. The lower Courts discussed whether McKenna failed to state a "*prima facie*" case of retaliation, and if acts by the Respondent which caused emotional/psychic harm to McKenna was "serious and of such a nature that no reasonable person could be expected to endure it".

VI. Respondent Concedes Nestle's Motion and Lower Courts' Dismissal of McKenna's Complaint was unwarranted.

A. "Count 1" of McKenna's Complaint:

In the Respondent's brief, Nestle now finally concedes McKenna's Complaint should have withstood a motion to dismiss (*Opp. Br.*, p. 13, ll. 12-16):

> "Had Petitioner simply alleged that Respondent caused a criminal complaint to be

> filed against him because he engaged in protected activity then arguably such allegations would have withstood a motion to dismiss"

Are you kidding? Clearly upon *plain reading*, let alone "liberal construction" of a *pro-se* Complaint, that is virtually indistinguishable from statement "1." of McKenna's Complaint (Appendix p. 20). The two passages are placed side by side with annotations added, so that Nestle's proposed verbiage can be transposed onto McKenna's Claim:

> **Nestle's proposed verbiage** (*Opp. Br.*, p. 13, ll. 12-16):
>
> "Had Petitioner simply alleged that *Respondent* (A) *caused* (B) a *criminal complaint* (C) to *be filed* (D) against *him* (E) because (F) *he engaged in protected activity* (G) then arguably such allegations would have withstood a motion to dismiss".
>
> **McKenna's Claim** (Appendix p. 20):
>
> "Nestle Purina PetCare Co., [*Respondent* (A)] by no less than, instigating [*caused* (B)] the filing of [*to be filed* (D)] false criminal charges [*a criminal complaint* (C)] against me [*against him* (E)], for [*because* (F)] my filing charges unlawful discrimination (opposition) against Nestle Purina PetCare Co., and directly participating proceedings (participation) against unlawful employment practices [*he engaged in protected activity* (G)]

It is precisely this type of ***Clintonesque*** *battle with* ***semantics*** that McKenna's Petition referred to on page 24, citing favorable concurrence of the Circuit Courts, "... the intent of Congress is not hampered by a combination of a strict construction of the statute in *battle with* ***semantics***" (*emphasis* ***added***). This sort of litigation antics is demonstrative of Nestle's vexatious litigation practices.

B. "Count 2" of McKenna's Complaint:

At pages 19-20 of the Petitioners Brief, McKenna raised that the emotional/ psychic harms in the *employment discrimination context* which McKenna **inarguably** *did* suffer as a *direct* result of Nestle's actions, were unlawfully bifurcated, then unlawfully imposed an inapposite bar to relief as is requisite under Restatement of Torts "Intentional Infliction of Emotional Distress". At pages 27-29 McKenna cited this Court's standards of harms within the *employment retaliation context.*

Respondent's Opposition Brief completely failed to oppose this issue. Respondent's complete failure to oppose this issue, clearly constitutes a concession by waiver on the issue of Respondent's liability regarding emotional/psychic harms which McKenna **inarguably** *did* suffer as a *direct* result of the cumulative affects of Respondent's perverse actions taken against McKenna [17].

—

[17] S. Ct. R. 15.2 states: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

VII. Other Acts of "Attorney Misconduct" Perpetrated Upon the Federal Judiciary:

Beyond the acts of "Attorney Misconduct" raised within McKenna's Petition and the acts of "Attorney Misconduct" detailed within this Reply Brief; substantial, well evidenced complaints of "Attorney Misconduct" are presently pending in *both* the Circuit and District Courts:

Pending Circuit Court Complaint: As detailed in McKenna's Application 09A1047 in this case: On January 11, 2010 pursuant to 6 Cir. Rule 46, McKenna filed a formal complaint of "Attorney Misconduct" with the Sixth Circuit of Appeals. On February 2, 2010, the Circuit Court issued notice indicating McKenna's complaint had been docketed as **Case No. 10-9501** (09A1047, Attachment A, p. 15). The issue of FRAUD that was filed with the District Court on August 3, 2010 was also supplemented to McKenna's **Case no. 10-9501** with the Circuit Court on August 2, 2010.

Pending District Court Complaint: On August 3, 2010 McKenna filed "Plaintiff's Motion to Set Aside a Judgment for Fraud on the Court" [18]. Within McKenna's Motion to Set Aside and the accompanying attachment, McKenna presents inarguable citations and exhibits *evidencing* material act of fraud perpetrated upon the lower Courts in the underlying case.

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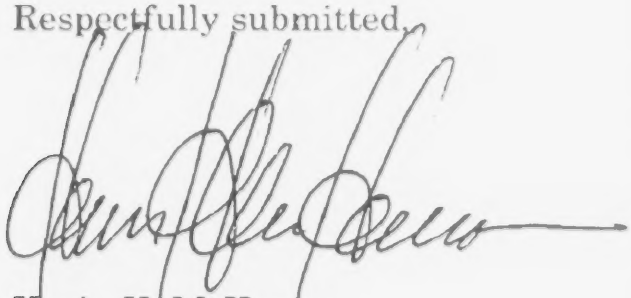
Regardless of whether the *numerous* acts of "Attorney Misconduct" referenced above are able to sustain on the merits for each alleged act of misconduct standing alone, the sum of those acts minimally establish "conduct unbecoming a member of the Bar of this Court" in violation of Rule S. Ct. Rule 8.1.

Accordingly McKenna requests Respondent's Counsel minimally be suspended from all proceedings before this Court, and disregard any merits represented by the Respondent's Opposition Brief.

CONCLUSION

McKenna has presented "clear and convincing evidence" to this Court evidencing Nestle has perpetrated frauds upon this Court, and the lower Courts. Accordingly, McKenna respectfully requests this Court justly enter an Order of Default Judgment in both of McKenna's pending cases against Nestle.

Respectfully submitted,



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